Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH WEISS,
Petitioner,

v.

REN LABORATORIES OF FLORIDA, INC.,
N/K/A GAMBRO HEALTH CARE LABORATORY,
A FLORIDA CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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August 20, 2001

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QUESTIONS PRESENTED

I. Whether voluntary prayer and proselytization among co-workers in a private corporation may constitute "religious harassment" in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*?

II. Whether Rules 50(b) and 59 of the Federal Rules of Civil Procedure or the Seventh Amendment to the United States Constitution preclude a trial court from ordering a new trial for insufficiency of the evidence after a jury verdict in favor of the plaintiff, where there was sufficient evidence such that judgment as matter of law could not be granted and the evidence adduced at trial consisted largely of circumstantial evidence turning upon the credibility of the witnesses?

PARTIES TO THE PROCEEDINGS

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Respondent's parent corporation is Gambro Healthcare, Inc., f/k/a Gambro Healthcare Patient Services, Inc., f/k/a REN Corporation - USA. There are no other known parent or subsidiary entities to these parties. There is no publicly held company that owns 10% or more of Respondent's stock.

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

KENNETH WEISS respectfully petitions this Honorable Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in *Weiss v. REN Laboratories, Inc.*, 251 F.3d 161, dated March 8, 2001, reversing the United States District Court for the Southern District of Florida's entry of judgment as a matter of law against Petitioner after a jury verdict in Petitioner's favor, but upholding the District Court's contingent grant of a new trial. Petitioner seeks review of the District Court's grant of a new trial, on the grounds that the District Court and the Eleventh Circuit erred by holding that Respondent established as a defense to its termination of Petitioner religious conduct protected by Title VII of the Civil Rights Act of 1964, and further erred by holding that the jury verdict was against the weight of the evidence based upon evidence of the same protected conduct.[1]

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit in *Weiss v. REN Laboratories, Inc.*, dated March 8, 2001, is unreported. The entry of the decision is noted at 251 F.3d 161 and the full text of the decision is set forth as Appendix A hereto. The unreported order of the Eleventh Circuit denying reconsideration and en banc review, dated May 21, 2001, is set forth as Appendix B. The unreported Order Granting Defendant's

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[1] Respondents have also filed a Petition for Writ of Certiorari, seeking review of the Eleventh Circuit's reversal of the judgment as a matter of law. Petitioner Kenneth Weiss raises issues in his Petition which are separate from those raised in REN Laboratories' Petition, although they arise out of the same predicate claims and defenses presented in the lower courts.

Motion for Judgment as a Matter of Law, entered by the United States District Court for the Southern District of Florida on September 24, 1999, is set forth in Appendix C. The District Court Judgment, dated September 24, 1999, is set forth as Appendix D.

JURISDICTIONAL STATEMENT

The decision of the United States Court of Appeals for the Eleventh Circuit was entered on March 8, 2001. Appendix ("App.") at A1. A petition for rehearing en banc was overruled by the Eleventh Circuit on May 21, 2001. Thus, Petitioner had until August 20, 2001 to file this Petition, the 90th day falling on the Sunday the 19th of August.

The District Court Final Judgment was filed on September 24, 1999. App. at D1. The Judgment entered judgment as a matter of law against Petitioner, and hence constituted a final judgment within the meaning of FED. R. APP. PROC. 4(a)(1)(A). A timely Notice of Appeal was filed by Petitioner on October 22, 1999.

The Supreme Court has jurisdiction to review the judgment in question on writ of certiorari in accordance with 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONST. AMEND VII (1791):

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

TITLE VII of the CIVIL RIGHTS ACT OF 1964:

> 42 U.S.C. § 2000e Definitions (2000). For the purposes of this title [42 U.S.C. §§ 2000e *et seq.*] –

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e-2 (2000). Unlawful employment practices. (emphases supplied):

(a) Employer practices. It shall be an unlawful employment practice for an employer--

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, *religion*, sex, or national origin;
>
> * * * *

(m) Impermissible consideration of race, color, *religion*, sex, or national origin in employment practices. Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, *religion*, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

STATEMENT OF THE CASE

Introduction.

This is a Title VII religious discrimination case. The jury returned a verdict in favor of Petitioner, finding that he was discharged as a result of the practice of his religion ("religion made

a difference" in Respondent's decision to terminate Plaintiff). The magistrate trial judge granted judgment as a matter of law and alternatively a new trial on the basis that the evidence was insufficient to support the jury verdict.

The Eleventh Circuit Court of Appeals reversed the judgment as a matter of law, concluding that reasonable jurors could have found for the Plaintiff based on a preponderance of the evidence. App. at A3. However, the court also affirmed the conditional order granting a new trial on the basis that the verdict was against the great weight of the evidence. App. at A5-A8. The Panel "reweighed" the evidence and found, contrary to the jury verdict, that the evidence "*strongly suggests*" Plaintiff was terminated for permissible reasons. App. at A8.

Factual History.

Every material issue of fact was disputed at trial, including the factual basis for the termination. The case went to trial by consent before United States Magistrate Judge Barry S. Seltzer on a Title VII religious discrimination claim. Petitioner's Amended Complaint alleged that he was discharged from his employment with Respondent based on his religion. (R. 1/28/1.) Respondent REN Laboratories is a medical laboratory which tests blood samples for hospital and dialysis clinics. (R. 9/215/218.) Petitioner was first employed by Respondent as a medical technician. It was not substantially disputed that Petitioner was qualified for his job and performed it satisfactorily. Petitioner received a Bachelor of Science degree in biology from the University of New York and a Medical Technologist Degree from St. Jude Hospital. He obtained a national board registry for medical technology and is a member of the American Society of Clinical Pathology. (R. 8/214/120-21.)

Petitioner was employed by REN July 14, 1992. (R. 9/215/215.) Pam McDaniel, Petitioner's supervisor before he was promoted, admitted that Petitioner was "an accurate and good technical employee." (R. 7/216/112.) She also admitted that Petitioner was not "an aggressive harsh person," but to the contrary he was "mild mannered." (R. 7/216/112.) She also agreed that

displays of anger would be out of character for Petitioner. (R. 7/216/126.) Dr. Brian Walters, scientific director for REN and hence Petitioner's supervisor, agreed that Petitioner was "technically sound as a medical technologist." (R. 10/217/106.)

Thus, in November 1992 Petitioner was promoted to night shift supervisor. Before Petitioner was terminated in July 1993, he was given two written warnings regarding substantive job performance (unrelated to religion), one before his promotion in October 1992 (R. 10/217/100,) and one after his promotion in February 1993. (R. 8/214/140.) The October 1992 warning was given by Dr. Walters, and was the only time he had occasion to counsel Petitioner regarding employment related issues (R. 10/217/107.) Dr. Walters downplayed the significance of the event saying that "these things happen." (R. 10/217/102.) The February 1993 warning involved a blood test done for AIDS in which Petitioner reported the wrong results. McDaniel agreed that all lab employees made mistakes and that even she had received written warnings for mistakes as a lab employee. (R. 7/216/111.)

Petitioner told the jury that he was a "born again" Christian. He stated that it changed his life, giving him meaning and a purpose that he did not have before: Christianity fulfilled him. (R. 8/214/123.) Petitioner held an interest not only in his own specific religious faith, but also in learning of the faiths of others. As a result of his background and beliefs, discussing religion and religious subjects interested him. Thus, for Petitioner it was natural to talk about religion. However, he told the jury that he knew there was "a time and place for it." He noted he had never been fired or disciplined for discussing religion prior to being an employee at REN. He explained that he had talked about it in prior employment situations, in appropriate settings, without any conflicts. (R. 8/214/126-27; 135-36.)

Petitioner testified that his faith required him to share his beliefs with others when appropriate. (R. 9/216/223.) He testified he never continued to discuss religion or his faith with anyone when he knew it was offensive to that person. (R. 8/214/137.) He explained that his approach to other people in regard to religious beliefs was to be "gentle and diplomatic," and that he would not try to force his

religious beliefs on someone if they did not want to listen to him. (R. 8/214/137; 181-82.) Petitioner knew that REN employed people of other faiths and beliefs, including Moslems, Jews, atheist, and agnostics, and he would speak to them about their beliefs. He informed the jury, however, that those individuals never complained about those discussions. (R. 8/214/136-37.)

Petitioner would also openly pray and offer prayer for others. He testified that prayer was important in every aspect of his life, and part of the practice of his faith. (R. 10/217/146.) For instance, Petitioner told the jury that once when Mary Piccola and Pam McDaniel informed him they felt ill, they allowed him to pray for them, holding their hands during prayer. (R. 8/214/137.) [2] Neither told him that they were offended. (R. 8/214/139.) On another occasion, Petitioner prayed for a co-employee who got hepatitis-infected blood in her eye. The employee consented to the prayer. (Petitioner also advised her to see a physician.) (R. 8/214/138-39.)

REN attempted to portray this type of prayer as disruptive and bizarre. For instance, REN brought out an incident through McDaniel involving a coagulant machine that broke during Petitioner's shift. Instead of calling a service technician to get the machine fixed, as she alleged Petitioner was supposed to, she testified that Petitioner only "prayed over" the machine, and then left it broken. (R. 7/216/138-39.) Petitioner's version of events was much different. He explained that the machine malfunctioned around 2 or 3 a.m, and he and another employee attempted to fix the machine according to company procedures, to no avail. One of the employees suggested he pray, and so he did. (R. 8/214/140-42.) Since the machine continued to malfunction, Petitioner informed the jury that he followed REN procedures which required him to notify Mary Piccola of the malfunction by e-mail, and then Piccola would have the machine fixed the next day. (R. 8/214/140-

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[2] This touching during prayer was described as "laying hands on," a description much more dramatic than the actual conduct. (R. 8/214/137-38.) Piccola in fact admitted she allowed the prayer, but denied the touching. (R. 10/217/200-201.)

42.) There was no evidence introduced of any discipline taken against Petitioner over this incident.

Petitioner also, in the practice of his faith, gave Bibles to co-workers. (R. 8/214/146.) He never received any negative comments regarding this practice. (R. 8/214/147.) He said that people would receive the Bible and say thank you, with the exception of Jahved Quershi, a Moslem co-worker, who rejected his offer. (R. 8/214/146-47.) However, Petitioner testified that he did not insist that Quershi take the Bible, and that Quershi merely said "No thank you." Petitioner also testified that he gave a Bible to Mary Piccola and that she received it and thanked him. (R. 8/214/147.) *Petitioner never received any written warnings regarding any aspect of the practice of his faith, with the exception of the notice of termination dated July 23, 1993.* (R. 8/214/148.)

It was uncontradicted that REN allowed its employees to discuss religion on the job. (R. 7/216/134.) It was also uncontradicted that no REN employee other than Petitioner was disciplined for discussing religion on the job. (R. 7/216/123.) With that factual backdrop, the evidence of discrimination against Petitioner chiefly turned upon his termination notice:

> Despite at least two separate warnings, *Ken continues to discuss RELIGION with REN employees.* Claudette Cannatella expressed her concern and discomfort to her immediate supervisor, Debbie Correggio, regarding Ken Weiss discussing what church she attended. When she said NONE, Ken gave her a lecture.

Plaintiff's Exhibit 6a, App. at G1. (emphasis of "all caps" in original.)

On its face, the termination unequivocally stated Petitioner was terminated for *discussing religion*. Petitioner also showed that the factual assertions contained in the notice were subject to dispute as well: there were not "two separate warnings" and Petitioner did not engage in a "lecture" of Claudette Cannatella regarding the church she attended.

The jury heard three versions of the Claudette Cannatella conversation: that version provided by Petitioner and his former wife, Virginia Savino; that provided by Cannatella; and that provided by Piccola in her termination notice. Savino testified that she went to a surprise party at REN one night in July 1993 held in honor of the departure of the receptionist, Francesca Garcia. (R. 7/216/63, 67.) When Garcia came into the room with her replacement, Cannatella, she came to Petitioner and Savino and introduced them. Garcia then invited Petitioner and Savino to come to her church, explaining that she was singing in the choir. Savino told her that they attended church on Sundays, but would attend if they could. (R. 7/216/67-69.) Savino then noticed a crucifix being worn by Cannatella, and asked her what church she attended. Cannatella responded that because she went out on Saturday nights, she didn't get up on Sunday mornings, "but I really should go." Savino replied: "Yeah, its good for everybody to go," and Petitioner *then* made his one and only statement to Cannatella: "Yeah, its good for everybody to go." Cannatella then said "Nice to meet everyone," and moved on. (R.7/216/68-69.)

Petitioner's version was similar. After Garcia and Cannatella introduced themselves, Savino commented about how pretty her crucifix was. Cannatella thanked her, and Savino then asked what church she attended. Cannatella said "I'm a Roman Catholic, but I'm not attending any church right now." Savino offered that "It's good to attend church... if you're a Christian you should go," to which Cannatella replied, "Yes, you're right." Petitioner *then* simply said "Yes," agreeing with Cannatella. Cannatella and Garcia then moved on. (R. 8/214/187-88.)

Cannatella's version was different, creating an issue of fact for the jury to resolve. Cannatella was hired July 22, 1993, and as of the time of trial, she was still employed at REN six years later. (R. 8/214/93.) She recalled the conversation regarding Garcia singing in the choir, but also recalled that it was Petitioner who asked about her crucifix, not Savino. (R. 8/214/99.) She also recalled being asked a series of questions, including whether she was a Christian, which church she attended, and when did she last attend church. Cannatella said this part of the conversation only lasted "a few

minutes." (R. 8/214/101-105.) But, after she left work that night, she called Deborah Corregio, her friend and supervisor, and the person who got her the job. (R. 8/214/106.) She told Corregio of the conversation, and asked whether she was "going to have to deal with this on a daily basis." (R. 8/214/106.) The next morning Corregio told Piccola. (R. 10/217/143.) When she came in the next day, Cannatella was called into Mary Piccola's office. Piccola told her that she wouldn't "have to worry about [Petitioner] bothering you anymore, ***he was terminated***." (R. 8/214/106-107.) Cannatella was "shocked." (R. 8/214/107.) Cannatella described Petitioner as "mild mannered," and testified that, despite the "crucifix conversation," she saw no reason she wouldn't have been able to work with Petitioner: "I don't think so, he was polite about it." (R. 8/214/108-109.)

Regarding the alleged two prior warnings, Petitioner testified that the only written warning he had received regarding religious discussions and his practice of religion was the termination notice itself. (R. 8/214/147-48.) He also testified that the oral conversations he had with REN supervisors gave him no warning that talking about religion, giving out Bibles or praying in public, would result in his termination. (R. 8/214/148-49.) The testimony of McDaniel and Piccola pointed to only two salient events: an August 1992 meeting with Dr. Walters; and an April 1993 meeting between Piccola, McDaniel, and Petitioner. (R. 7/214/137, 142.) The evidence before the jury, however, brought into question whether these were "warnings" at all, and whether Petitioner had even harassed employees.

Pam McDaniel was the day shift supervisor, acting as the Quality Assurance director. (R. 7/216/103.) Before Petitioner was promoted to night shift supervisor, she had some supervisory authority over Petitioner. McDaniel testified that in August 1992 Petitioner was counseled regarding "unwanted religious discussions." (R. 7/216/137-38.) Nonetheless, she also testified that Petitioner's discussion of religion with other employees was not a problem until he was promoted to a managerial level. (R. 7/216/116.) The jury likewise heard from Dr. Walters, to whom McDaniel had referred the matter for investigation, that there was

no substance to these allegations. (R. 10/217/91-92, 103.) In fact, *no one* on the laboratory staff corroborated the allegations of "excessive discussion of religion." (R. 10/217/103.) Dr. Walters testified that only because the allegations came from a supervisor (McDaniel), did he then talk to Petitioner. Thus, Dr. Walters had a general discussion with Petitioner indicating that the topics of "sex, religion and politics" didn't fit into the workplace. He said that he put the other two topics into his discussion because he "*didn't find anything*" in his investigation, and did not want to focus on one topic as opposed to others. (R. 10/217/103-106.) This was not a warning at all, and called into question McDaniel's credibility.

The only other "warning" received by Petitioner came at a meeting between Piccola, McDaniel, and Petitioner on April 21, 1993. Petitioner testified that he was not informed at any time that his behavior regarding discussing religion could result in termination. (R. 8/214/148-49). At the April 21st meeting, they informed him of only one complaint, and they did not tell him who complained or what was said. Their description of the alleged offending conversation was vague, to the effect that the unnamed complaining party "didn't like [his] religious views." (R. 9/215/262-63.) Since he did not know who complained or about what, he asked them to apologize to that person because he didn't "want to offend anybody." (R. 9/215/263.)

McDaniel, however, said that there were multiple complaints from the Moslem co-worker, Jahved Quershi, and Jane Christy and Joan Caruso, presented as gay employees. (R. 9/215/142.) She and Piccola met with Petitioner, and Piccola tried to emphasize "how serious these problems were." According to McDaniel, Petitioner did not take the criticism seriously. (R. 7/216/146.) Piccola stated that at the meeting she reviewed all the complaints with Petitioner and gave Petitioner a written warning, which he signed. (R. 11/218/218-19.) *That written warning, however, was not in Petitioner's file.* (R. 11/218/253.) Dr. Walters, who was present at Petitioner's termination meeting, testified that he was not aware of any written warning given to Petitioner regarding discussing religion. (R. 8/214/122.) Again there was no verbal correction form documenting the "warning." Given Petitioner's

denial of receiving a written warning, coupled with this lack of documentation, a reasonable conclusion for the jury to have drawn was that not only was there never a written warning, but Piccola and McDaniel had lied about it to back up their reasons for Petitioner's ultimate termination.

Quershi, a seven year employee of REN at the time of his testimony, testified that after a couple of religious discussions with Petitioner, he asked Petitioner to stop talking about religion, and that Petitioner was trying to convince him that his religion was the best. (R. 10/217/55.) Quershi also testified about Petitioner's attempted gift of a Bible. Quershi refused it and testified that it was offensive to him because he is a Moslem and that "I believe you should know it's very fanatic, I personally wouldn't accept any other religion but Moslem [sic]." (R. 10/217/56.) A fair inference here is that Quershi was hyper-sensitive to the discussion of any other religion but his. Petitioner, however, recalled that he offered Quershi a Bible, and Quershi simply rejected it saying "No thank you." Petitioner did not insist that Quershi take it, and Petitioner did not have a lengthy discussion with him about it. (R. 8/214/146-47.) Petitioner noted that Quershi, as a Moslem, prayed regularly, and so prayed on the job. He would leave his post at the appropriate time and go somewhere to pray. As far as Petitioner knew, no one ever ridiculed Quershi for his religious practices. (R. 8/214/179.) Petitioner thought he had a good working relationship with Quershi. (R. 8/214/185.)

Christy did not testify at trial, but Caruso did. Petitioner did not recall Caruso at all, but did recall conversations with Christy. Petitioner informed the jury that Christy, like other employees, would voluntarily approach him to talk about religion. Christy informed him that she was a member of a homosexual church in Ft. Lauderdale. Petitioner explained that he did not know that homosexuals had a church, and it intrigued him. He stated: "We would talk about that and one time I gave her a Bible and showed her a passage in there saying what the Bible says about the homosexual lifestyle."(R. 8/214/180.) Petitioner denied ever telling her that she would "burn in hell," and denied that he ever told anyone that he was going to "cure their homosexuality." (R.

8/214/181.)

Caruso, an employee of REN since 1990, was quite clearly hostile toward Petitioner. She related that Petitioner approached her many times to talk to her about religion, but she would not talk to him. He would bring his Bible into her department, point out scriptures that would state different things about her lifestyle, and say that she was going to hell because she was a lesbian. She said that Petitioner referred to himself as a "prophet." She said this happened 3 to 4 times a week. (R. 10/217/68-71.) However, Caruso worked the day shift, not the night shift as Petitioner did, except during a period of time from the middle of 1992 through January or February 1993. (R. 10/217/85-86.) Even though her testimony was that she was no longer working late as of February 1993, she maintained that she continued to be harassed by Petitioner between February and July 1993. (R. 10/217/86.) She did not explain this inconsistency.

Before the "crucifix conversation" with Claudette Cannatella, discussed above, there were two other events in mid-July 1993 which preceded Petitioner's termination. The evidence was in conflict, but a reasonable view of the evidence supported Petitioner's position. First, Petitioner received a written warning and a two day suspension on July 14, 1993 for leaving his shift early the preceding day. The notice indicates that Petitioner "Left the shift before testing was complete. Shift was overwhelmed with work and Ken did not help techs." Petitioner explained that he would usually leave the lab at 3:00 a.m., which was the end of the shift. However, in general he would stay until he felt, in his professional opinion, that there were no problems and that whoever was left behind could finish the work and lock up the lab. He testified that there was no requirement by Federal or Florida law that he had to be on the premises until the last technician left. However, the first time he received any warnings or discipline regarding leaving the night shift early was this written warning. (R. 8/214/167.) Significantly, Mary Piccola testified that she issued this written warning, instead of just an oral warning, because in her mind it was a serious offense for a supervisor to leave his shift unattended, in contravention of Florida law: she stated that the supervisor

personally had to be on the shift. (R. 11/218/226-27.)

Nonetheless, the jury had already heard Dr. Walters testify earlier that that was incorrect.

> [T]hat's a grey area.... I got to be very honest with you here, sometimes the supervisor may leave before his shift, if all the work is in complete and there's a few specimens left over and he has made provisions with the people in the laboratory.... that's a call that we leave with that supervisor....

(R. 10/217/108-109.) In fact, Dr. Walters stated that the laboratory complied with Florida law simply by having a day shift supervisor who would be on call and available for consultation. In short, the inference which the jury could have reasonably drawn was that the two day suspension was unwarranted under REN's procedures, and that Mary Piccola singled out Petitioner and disciplined him unfairly for another reason: because she did not like his religion.

The second event occurred about a week later, on July 21, 1993. Petitioner, Piccola and McDaniel met to discuss generally Petitioner's job duties. (R. 7/216/128.) Petitioner testified that they told him they were increasing his duties, which he expressed he felt was unfair. (R. 8/214/167-68.) But he was primarily disturbed because he had learned when he returned from his suspension that Dr. Walters had taken over his shift, but had not been required to stay on premises (R. 8/214/268,) contrary to the reasoning behind Petitioner's suspension and Piccola's directions to him. He confronted Piccola with this, and Piccola did not deny it. (R. 8/214/170-71.)

Petitioner then demonstrated for the jury what happened next. He said "Mary, I won't put up with that," and then struck his hand on the desk for "dramatic" effect. He then said "I resent that, that Dr. Walters can leave and I have to stay." (R. 8/214/183.) Piccola's response was to stand up, come out from around the desk, grab his chin and throw him out of the office, saying "Get out of my face, get out of my face." Petitioner told her she had no right

to touch him, she let go and he left. (R. 8/214/155-56, 171.) On cross examination, Petitioner agreed he was upset, but denied being enraged and denied blocking Piccola's way out of the office. (R. 8/214/270.) In fact, that same day he and Piccola met again, and they apologized and agreed to forget the entire incident. (R. 8/214/270-72.)

Piccola and McDaniel had different versions. Piccola denied grabbing or touching Petitioner on his face, but because her written report mentioned she touched his chest, she conceded that must have occurred. (R. 11/218/230-33.) McDaniel however recalled that Piccola did touch his face. (R. 7/216/127.) Both Piccola and McDaniel testified generally that he reacted violently, and scared them. Piccola said Petitioner blocked her exit from the office. (R. 7/216/147-49; 11/218/230-233.)

On cross examination Piccola admitted that she prepared a written document regarding the July 21st incident on July 23rd, *after* the termination notice was done. (R. 11/218/276.) On her document regarding the July 21st incident, in handwriting she noted that it wasn't given to Petitioner because he "was terminated for another reason" (*i.e.*, "RELIGION").

As discussed earlier, the "crucifix conversation" lead to Petitioner's discharge. The notice of termination, dated July 23, 1993, *only* mentioned religious discussions. Petitioner testified that he was called into Piccola's office when he arrived that day. He was presented the notice without discussion, which he read and signed, and then he was escorted out of the building. (R. 8/214/152.)

Procedural History.

The trial court deferred all motions for judgment as a matter of law, and allowed the case to go to the jury. After four days of trial, the case was submitted to the jury. The jury was instructed in pertinent part as follows with respect to Petitioner's charge of religious discrimination:

As a matter of law, the Court instructs you that it is an

unlawful employment practice for REN Laboratories to discharge Ken Weiss because of his religion. The term "religion" includes all aspects of Ken Weiss' religious observance and practice, as well as belief, unless REN Laboratories demonstrates that it is unable to reasonably accommodate Ken Weiss' religious practice without undue hardship on the conduct of REN Laboratories' business.

More specifically, the Plaintiff alleges that he was terminated for discussing religious issues with people at REN Laboratories in an non-offensive manner.

The Defendant denies that Mr. Weiss was terminated for discussing religion in a nonoffensive manner. REN claims that he was terminated for harassing the employees about his religion as well as for insubordination and unsatisfactory performance.

In order to prevail on his claim, the Plaintiff must prove each of the following things by a preponderance of the evidence:

1. That he was a member of and/or practices a particular religion; and
2. That he was qualified for and satisfactorily performed the job at issue; and
3. That he suffered some adverse employment action; and
4. That someone outside the protected class of which he is a member was treated differently.

[I]t is not necessary for the Plaintiff to prove that religion was the sole or exclusive reason for the Defendant's decision, it is only necessary for the Plaintiff to prove that religion made a difference.

The parties agree that the Plaintiff was permitted to practice his religion in the workplace to the extent that he did not harass other employees. The parties further agree that the Defendant could lawfully discharge an employee for harassing other employees, for performing his tasks in

> an unsatisfactory manner, or for insubordinate behavior. It will be up to you, the members of the jury, to determine whether or not Plaintiff harassed other employees, performed his duties in an unsatisfactory manner or behaved in an insubordinate manner.

See App. at E4 - E6. While the jury was instructed that Respondent could lawfully terminate Petitioner for harassing co-workers, App. at E6, the jury was not provided with a definition of Respondent's defense of religious harassment.

The jury returned a verdict for Petitioner. The jury found the following in response to special interrogatories:

1. Mr. Weiss was qualified for, and satisfactorily performed his job (App. at F1);
2. Mr. Weiss did not harass other employees (*Id.*);
3. Religion made a difference in REN's decision to terminate Mr. Weiss (App. at F2);
4. Mr. Weiss suffered compensatory damages in the amount of $35,000 (*Id.*); and
5. REN acted willfully, intentionally or with reckless indifference to Plaintiff's rights in terminating Mr. Weiss, awarding him $125,000 in punitive damages. (App. at F3)

On Respondent's post-trial motions, the court entered judgment as a matter of law and alternatively granted a new trial. App. C. Petitioner appealed to the Eleventh Circuit.

On review of the FED. R. CIV. PROC. 50 judgment as a matter of law, without reweighing the evidence and considering the facts in a light most favorable to Petitioner, the Eleventh Circuit held:

> Reasonable jurors could have found, by a preponderance of the evidence, that (1) Appellant satisfactorily performed his job, (2) he did not harass his co-workers, and (3) religion made a difference in appellee's decision to terminate Appellant.

App. at A3.

The Court of Appeals thus found, based on the testimony of the two REN supervisors, Dr. Brian Walters and Pamela McDaniel, that Petitioner was a good and accurate employee. *Id.* The court "accepted" Petitioner's statement that the Moslem co-worker to whom he offered the Bible simply rejected the offer, saying "No thank you" and that Petitioner did not try to push the Bible on him. App. at A4. The court accepted Petitioner's testimony that he never told a lesbian co-worker that she would "burn in hell." *Id.* The court accepted Petitioner's testimony that the coworkers with whom he prayed did so by consent and were not offended, and that Petitioner's only involvement with Claudette Canatella at the farewell party was to agree with Savino's remark that "It's good to attend church." *Id.*

The court then flip-flopped, and conducted a "reweighing" of the evidence resulting in inferences and conclusions contrary to the jury's verdict, and consistent with Respondent's version of the facts. For instance, the court noted several other factual points from the record that would support a finding that Petitioner was not competently performing his job. App. at A5-A6. This was in spite of the fact that the District Court expressly stated that it was granting judgment as a matter of law and a conditional new trial because Plaintiff failed to introduce sufficient evidence to negate as reasons for termination religious harassment and insubordination, not incompetency. App. at C2, C25. The trial court expressed it thusly:

> The dispositive issue was the complex one of Defendant's intent – whether Defendant terminated Plaintiff because it intended to discriminate against him on the basis of his religion or because it honestly believed he had been insubordinate and religiously harassing employees.

App. at C25.

On the harassment issues, the court reviewed the evidence surrounding Petitioner's offer of the Bible to Quershi. It concluded that Petitioner *"should have known* that a practicing Moslem

would, at the very least, *not appreciate*" Petitioner's offer of a Bible and inferred that, with this knowledge Petitioner's "gesture *takes on tones of proselytization*." App. at A6 (emphases supplied).

Regarding Petitioner's alleged conversations with Christy, the professed lesbian, the Eleventh Circuit reviewed and quoted from a Biblical passage supposedly discussed by the two employees, *even though the jury did not hear the passage and the actual passage used was nowhere in the record.* Selecting the archaically-worded 17th-century King James Version and setting out two verses from *Romans* Chapter 1 in a footnote to the opinion, the court then concluded based on this passage that the discussion was "negative" and "inappropriate," even though Petitioner testified that the conversations were consensual. App. at A6-A7; R 8/214/180.

Finally, the Court reviewed the evidence as to Petitioner's offer of prayer for sick co-workers, concluding it was "not prudent behavior" and "highly inappropriate" in the work place – "*even if co-workers agree to participate*" (which Petitioner had testified they did, and that in fact some had requested). App. at A7. The Court inferred that the "co-workers *may have felt* pressured to acquiesce" to Petitioner's offer. *Id.*

Petitioner Filed a Petition for Rehearing and for Rehearing En Banc, seeking review by both the panel and, alternatively, the full Circuit en banc. The Petitions were denied May 21, 2001. App. B. This Petition follows.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO ALLOW THE SUPREME COURT TO CLARIFY THE STANDARD FOR TITLE VII RELIGIOUS HARASSMENT, AND TO DELINEATE WHERE PROTECTED "RELIGIOUS OBSERVANCE AND PRACTICE" LEAVE OFF AND UNPROTECTED "HARASSMENT" BEGINS

The District Court and the Eleventh Circuit misconstrued the

scope of permissible religious speech and conduct in the workplace in part as a consequence of the absence of definition from the Supreme Court and the Equal Employment Opportunity Commission on the meaning of impermissible "religious harassment." The Supreme Court has never reviewed a case construing the application of Title VII's nondiscrimination provisions to religious harassment, as it has for gender harassment. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems*, 510 U.S. 17 (1993); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). The doctrine of race-based environmental harassment was considered by the Court to be the progenitor of gender harassment, and thus consideration of racial harassment was subsumed within the Court's discussion of gender harassment. *See Faragher*, 524 U.S. at 787, n.1 ("Courts of Appeals in sexual harassment cases have properly drawn on standards developed in cases involving racial harassment."); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, at 767-68 (1998) (Thomas, J., dissenting). The Equal Employment Opportunity Commission has considered and failed to adopt regulations defining and delineating religious harassment under Title VII, and hence federal regulatory guidelines are unavailable to direct the courts and counsel the Supreme Court, as they did in *Meritor*. 477 U.S. at 65-66.

As a result of the lack of direction from the Supreme Court and the EEOC, the Circuit Courts of Appeal have struggled and failed to develop a generally accepted definition of "religious harassment." *Cf. Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012 (4th Cir. 1996); *Venters v. City of Delphi*, 123 F.3d 956 (7th Cir. 1997) (applying *Meritor* framework of both *quid pro quo* and hostile work environment harassment to claim of religious harassment); *Beasley v. Health Care Service Corp.*, 940 F.2d 1085 (7th Cir. 1991); *Hernandez-Torres v. Intercontinental Trading, Inc.*, 158 F.3d 43 (1st Cir. 1998) (upholding religious harassment jury instruction that set forth factors for consideration but did not define the term); *Weiss v. REN Laboratories, Inc.*, 251 F.3d 161 (11th Cir. 2001) (instant case). *See generally* Annotation, "What Constitutes Religious Harassment in Employment in Violation of

Title VII of Civil Rights Act of 1964," 149 A.L.R. Fed. 405.[3]

This dearth of standards is all the more disturbing in view of the fact that, unlike other protected classes such as race and gender, the religion protections of Title VII expressly protect an employee's religious *profession* and *conduct* as well as his or her status as a religious person:

> (j) The term "religion" includes *all aspects of religious observance and practice*, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j) (emphasis supplied). The specific inclusion of observance and practice among Title VII's protections for religious workers mirrors the First Amendment's protection of "religious *exercise*" in addition to religious belief. [4] Both Title VII

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[3] Few of the reported Circuit Court cases arose in the context of a direct action by an employee for religious harassment under Title VII. Rather, they typically arise as a defense to a Title VII claim for religious discrimination, where an employer contends that it took action against the plaintiff religious employee for religious speech or conduct it considered harassing. For this reason, Petitioner's case is representative of the ordinary factual and procedural framework for applying Title VII religious harassment law.

[4] Indeed, other circuits, addressing claims of alleged harassment imposed by religious workers, have been careful to protect religious expression in situations where employers sought to prevent religious harassment. In *Tucker v. California Dept. of Educ.*, 97 F.3d 1204 (9th Cir. 1996), for example, the Ninth Circuit Court of Appeals struck down a state Department of Education "zero-tolerance policy" which forbade employees from using any religious symbols or phrases with religious connotations on any job-related documents, and forbade employees from discussing religious matters at the workplace or displaying religious materials. The Ninth Circuit held

and the First Amendment express the recognition that religion is not merely a status, but a comprehensive world view that informs the adherent's perspectives on a multitude of life's issues and concerns. *See Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 831 (1995); Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. Rev. 2059 (1996) ("Devout religious upbringings carry with them experiences that secular upbringings do not; and even more important, religion is inherently tied to a particular outlook on the world and a particular set of ideas."). Simply stated, religious persons say and do religious things. The text of Title VII recognizes that fact, and accords these expressions the same protection as religious status, provided they can be reasonably accommodated.

Contrary to the plain language of Title VII, the Eleventh Circuit's decision effectively chills innocuous religious speech and conduct in the workplace. Two of the court's findings are particularly troubling in this regard. First, the court found that Petitioner's polite offer of a Bible to a Moslem was evidence of harassment warranting termination. The Eleventh Circuit opined,

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that the Department violated Tucker's rights of religious expression by implementing such restrictive policies. 97 F.3d at 1217.

The Eighth Circuit likewise vindicated the claim of a plaintiff who alleged that his employer's imposition of a religion-free workplace violated his First Amendment right to religious expression. In *Brown v. Polk County*, 61 F.3d 650 (8th Cir. 1995), the county's director of information services, a Christian, permitted co-workers to pray in his office during departmental meetings and once invoked Scripture to discourage sloth on the job. In response, the county administrator ordered Brown to cease engaging in any activity that could be construed as "religious proselytizing, witnessing, or counseling." 97 F.3d at 652. Brown was ordered to remove all religious paraphernalia from his office, including his desk Bible. *Id.* at 653. The Eighth Circuit corrected such excess. *Id.* at 654. While both of these cases involved public employers and were therefore decided directly under the First Amendment, the same principles protect religious expression under Title VII.

"Appellant should have known that a practicing Moslem would, at the very least, not appreciate Appellant's unsolicited offer of a Christian Bible. With his knowledge of Quershi's religion, Appellant's gesture takes on tones of proselytization." App. at A6. This characterization of a polite offer of a religious text as inherently offensive and harassing reveals an anti-religious animus that owes more to religious stereotyping than thoughtful adherence to the law. Although it may be true that certain fundamentalist Moslems may be automatically offended by religious overtures from other faiths, this is by no means true for all Moslems. Moreover, the Court of Appeals' religious paternalism raises a host of questions it cannot answer. May a Moslem offer a Jewish or Christian co-worker a copy of the Koran, or must he refrain from doing so because he "should know" they would "not appreciate" it? Should an atheist consider himself the victim of religious harassment if an Orthodox Jew politely offers him a copy of the Torah? This ruling leaves religious employees with little choice but to completely refrain from offering religious literature to others in the workplace, for fear of being terminated for harassment. Even more chilling will be the effect of the decision on employers, who may now perceive themselves at risk of liability for failing to prevent harassment if they do not impose a policy forbidding their employees from offering religious literature to co-workers. Title VII was intended to protect religious expression in the workplace, not stifle it.

The Eleventh Circuit's opinion also identifies consensual prayer for sick co-workers as evidence of harassment. The court states that "initiating a prayer session in a place of employment – even if co-workers agree to participate – is not prudent behavior." App. at A7. Surely consensual prayer is a core religious practice demanding utmost protection.

Situations involving claimed religious harassment, infinitely more so than cases of sexual harassment or racial harassment, require protection of a right of expression of the highest order. Professor Douglas Laycock summarized well the conundrum presented by religious harassment cases: "Claims of religious harassment present a conflict between every employee's right to religious expression and every employee's countervailing right not to be harassed

because of his religion or lack thereof." *The Effect of the EEOC's Proposed Guidelines on Religion in the Workplace: Hearing Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 103d Cong., 2d Sess. 39 (1994) (prepared statement of Professor Douglas Laycock). *See also* Josh Schopf, *Religious Activity and Proselytization in the Workplace: The Murky Line Between Healthy Expression and Unlawful Harassment*, 31 Colum. J.L. & Soc. Probs. 39 (1997). Unfortunately, the Eleventh Circuit failed to give proper consideration to balancing both protections in this case.

If religious expression is not provided the full measure of protection intended by Title VII, religion will be accorded "protection" merely as a status – a classification devoid of content for the tens of millions of devout adherents in the United States, Christian, Jewish, Moslems, Buddhist, Hindu and otherwise. The result of the Eleventh Circuit's misguided disregard for the rights of religious persons in the workplace, if left to stand, would be to construe Title VII to protect a religious worker provided he does not conduct himself in a religious manner – a "pyrrhic victory" for religious persons, to say the least. *See Lynch v. Donnelly*, 465 U.S. 668, 727 (1984) (Blackmun, J., dissenting). Certiorari should be granted to permit the Supreme Court to clarify that religious speech and conduct in the workplace is to be accorded fully protected status in the workplace under Title VII.[5]

II. CERTIORARI SHOULD BE GRANTED TO ALLOW THE SUPREME COURT TO BRING CLARITY TO THE NOTORIOUSLY UNSETTLED STANDARD FOR GRANTING A

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[5] Petitioner submits that the Eleventh Circuit's radical departure from the plain language and meaning of the religion protections of Title VII may constitute appropriate grounds for summary reversal. *Clark County School Dist. v. Breeden*, 121 S.Ct. 1508 (2001) (granting employer's petition for writ of certiorari to the Court of Appeals and summarily reversing, holding that as a matter of law the evidence could not support a finding of severe and pervasive gender harassment).

NEW TRIAL FOR INSUFFICIENCY OF THE EVIDENCE UNDER FED. R. CIV. PROC. 59(e) AND APPELLATE REVIEW THEREOF

> The power of a federal judge to grant a new trial on the ground that the verdict was against the weight of the evidence is clear. The standard that is to control in passing on motions of this kind is not.

Wright & Miller, FEDERAL PRACTICE & PROCEDURE, § 2806, p. 63 (citing *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940). Professors Wright and Miller attribute this lack of clarity to a "recurrent tendency on the part of courts to confuse the standard for a new trial that for a directed verdict or a judgment notwithstanding the verdict (now referred to as a judgment as a matter of law)." *Id.* Likewise, "There are few subjects in the entire field of procedure that have been subject to so much change and controversy in recent years as the scope of review of an order granting or denying a motion for a new trial." Wright & Miller, § 2818, p. 194.

Wright & Miller regard the Third Circuit's analysis of this issue in *Lind v. Schenely Industries, Inc.*, 278 F.2d 79 (3rd Cir.), *cert. den.*, 364 U.S. 835 (1960), as "the fullest discussion of the standard." *Id.*, § 2806, at p. 68. The court noted there was "little authority" on the point and "the few available authorities are conflicting." 278 F.2d at 89, Wright & Miller, *id.*, at p. 69. One group of authorities held that a trial court should not interfere with the verdict unless it is quite clear that the jury has reached a seriously erroneous result, and that it should not set aside the verdict simply because it would have reached a different conclusion. *Id.* Wright & Miller cite as an example of this articulation *Tennant v. Peoria & Pekin Union Ry.*, 321 U.S. 29 (1944), in which this Court cautioned:

> It is the jury, not the court, which is the factfinding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert

> instructions and draws the ultimate conclusion as to the facts.... Its function is to select among conflicting inferences and conclusions that which it considers most reasonable. That conclusion, whether it relates to negligence, causation, or any other factual matter cannot be ignored.

321 U.S. at 35. *See also*, cited in Wright & Miller, *Velasquez v. Figueroa-Gomez*, 996 F.2d 425 (1st Cir.), *cert. den.*, 510 U.S. 993 (1993); *Bevevino v. Saydjari*, 574 F.2d 676 (2nd Cir. 1978); *Gebhardt v. Wilson Freight Forwarding Co.*, 348 F.2d 129 (3rd Cir. 1965); *Cities Serv. Oil Co. v. Launey*, 403 F.2d 537 (5th Cir. 1968); *Werthan Bag Corp. v. Agnew*, 202 F.2d 119 (6th Cir. 1953); *Fireman's Fund Ins. Co. v. Aalco Wrecking Co.*, 466 F.2d 179, *cert. den.*, 410 U.S. 930 (1972).

A second line of decisions appeared to the Third Circuit to go even farther than this, although it held the difference seemed to lie in the severity of the terms used to describe the egregiousness of a verdict before it may be set aside. 278 F.2d at 89-90, Wright & Miller, *supra,* at p. 70. *See*, cited in Wright & Miller, *United States v. L.E. Cooke Co.*, 991 F.2d 336 (6th Cir. 1993) (motion should be denied if verdict is one that could reasonably have been reached, and verdict is not unreasonable simply because different inferences and conclusions could have been drawn or because other results were more reasonable); *Dunlap-McCuller v. Riese Organization*, 980 F.2d 153, *cert. den.*, 510 U.S. 908 (1992) (grant of new trial on weight of evidence should be reserved for occasions when jury's verdict was egregious).[6] A third line of

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[6] A conflict of authority within the Eleventh Circuit is indicative of the inconsistent application of the rule spoken of by Wright & Miller. *Cf. Rosenfeld v. Wellington Leisure Products Inc.*, 827 F.2d 1493 (11th Cir. 1987) (judgment as a matter of law and alternative new trial granted after favorable jury verdict; court reversed both, finding conflicting testimony on crucial issues). "Whether the trial judge or this court would have reached the same conclusion is irrelevant as

decisions, seeming to give the trial court almost unlimited discretion, was noted, 278 F.2d at 90; but Wright & Miller note, "[t]he unlimited discretion standard... seems to have fallen out of favor with modern courts, as evidenced by its absence from recent opinions." Wright & Miller, *supra*, at p. 72.

The Third Circuit, in conclusion, distinguished Rule 59 motions based on weight of the evidence from those based on other grounds in which some "undesirable or pernicious element has occurred or been introduced into the trial" and in which the trial judge "must necessarily be allowed wide discretion in granting or refusing a new trial." 278 F.2d at 90, Wright & Miller, *id.* When the trial judge acts only on the basis of the weight of the evidence, the court stated, he has,

> to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of facts.

278 F.2d at 90, Wright & Miller, *supra*, at p. 73.

Professors Wright & Miller suggest that "a decent respect for the collective wisdom of the jury" should ordinarily militate that the court accept the jury's findings, regardless of its own doubts. *Supra*, at 74. This high regard for the civil jury system also informed the Seventh Amendment's guarantee of a civil jury trial, the purpose of which was to preserve "the common law distinction between the province of the court and that of the jury, whereby... issues of law are resolved by the court and issues of fact are to be

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long as there is some support for the jury's decision." *Id.* at 1497-1498. See also *Redd v. City of Phoenix City, Alabama*, 934 F.2d 1211, 1215 (11th Cir. 1991) (Section 1983 racial discrimination claim; review of a district court's order granting a new trial based on insufficiency of the evidence "will be extremely stringent to protect the party's right to a jury trial") (citations omitted).

determined by the jury." *Baltimore & Carolina Line v. Redman,* 295 U.S. 654, 657 (1935). "Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense, the 'passional elements in our nature,' and thus keep the administration of law in accord with the wishes and feelings of the community." *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322, 344 (1979) (Rehnquist, J., dissenting), quoting Oliver Wendell Holmes, COLLECTED LEGAL PAPERS 237 (1920).

The Supreme Court has endeavored to preserve the vital role of the jury against incursions by the lower courts.

> During the first 180 years of the Bill of Rights, the constitutional guarantee most frequently and aggressively enforced by the Supreme Court was the seventh amendment right to trial by jury in civil cases. Prior to 1968 the Court regularly granted review in several cases each year to consider the sufficiency of the evidence to support a disputed jury verdict, and in the overwhelming majority of the more recent cases did so to reinstate a jury verdict that had been overturned by an appellate court.

Eric Schnapper, *Judges Against Juries – Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237. Disregard of this historic role has led to "the 'gradual process of judicial erosion which... has slowly worn away a major portion of the essential guarantee of the Seventh Amendment.'" *Parklane Hosiery,* 439 U.S. at 339 (Rehnquist, J., dissenting), quoting Justice Black in *Galloway v. United States,* 319 U.S. 372, at 397 (1943).

In view of this proper regard for the jury's function, the Court of Appeals set the bar for reviewing the jury's verdict much too low when it stated, "A court may conclude a jury verdict is contrary to the great weight of the evidence even if the Record contains some evidence supporting the jury verdict." App. at A5. When the trial involved simple issues, highly disputed facts, and there is an absence of "pernicious occurrences" [*e.g.*, juror misconduct] "the

stringent standard of review is required." *Hardin v. Hayes*, 52 F.3d 934, at 938 (11th Cir. 1995). Here, the issues were simple: did Petitioner harass his co-workers, and if not, was Petitioner terminated as a result of the practice of his religion? The facts were highly disputed on almost every point at issue. "[T]he more sharply the evidence conflicts, the more reluctant the judge should be to substitute his judgment for that of the jury." Wright & Miller, FEDERAL PRACTICE & PROCEDURE, § 2806, at p. 67. And there was nothing that occurred at trial which could have influence or caused the necessity of a new trial; the sole basis for the new trial was insufficiency of evidence.

The appeals court's decision states that the evidence "strongly suggests" that Petitioner was terminated for poor job performance, insubordination and religious harassment of co-workers. In particular, however, the facts are undisputed that Petitioner was not fired because of job performance, and that was expressly *not* one of the grounds upon which the District Court set aside the jury's verdict. The termination notice clearly indicated that the sole basis for his termination was the Claudette Cannatella conversation. While Piccola testified that after she discharged Petitioner, she was directed to terminate Petitioner for the July 21, 1993 incident, both she and McDaniel prepared written warning forms, after the termination, neither of which recommended termination; Piccola's recommended suspension; McDaniel's recommended counseling. The court also disregarded the fact that Petitioner presented evidence from which the jury could conclude that REN manufactured the offending Claudette Canatella conversation, turning it falsely into the "one last straw" of religious harassment, and that the jury could conclude that the real reason Petitioner was fired was not because he was harassing co-workers but because of the practice of his religion. "If the only reason an employer offers for [its challenged action] is a lie, the inference that the real reason was a forbidden one may rationally be drawn and there must be a trial." *Helland v. South Bend Community School Corp.*, 93 F.3d 327, 330 (7th Cir. 1996).

The court also relied upon Dr. Walters' August 1992 conversation with Petitioner as a "counseling" session, ignoring

Walters's testimony that he was asked to perform an investigation of the allegations but found no evidence of them. (R. 10/217/103.) Dr. Walters testified that he only had a general discussion with Petitioner – not a warning, not a counseling session, and nothing specific. (R. 10/217/103-106.) Further, the court ignored the fact that if this was truly a counseling session, there would have been a written record of it, just as there was for the work performance counseling sessions in October, February and July. The lack of this written form, both for this counseling session and the April 1993 counseling session should have been deemed favorable evidence for Petitioner. *See Fourtier v. Ameritech Mobile Communications Inc.*, 161 F.3d 1106, 1114 (7th Cir. 1998).

The court paid a great deal of attention to the Christy conversation, noting that Petitioner's "behavior is particularly unacceptable." App. at A7. However, Christy did not testify at trial. Any testimony regarding Christy's conversations with Petitioner came either from Petitioner directly, or from third parties as hearsay testimony. The court thus gave hearsay testimony "greater weight" than the in-court testimony of the other participant to the conversation.

The district judge and the Court of Appeals found, in the face of conflicting evidence and the necessity to make credibility choices, that the jury verdict was against the great weight of the evidence even though there was "some support" for the jury's verdict. The court utilized a standard of review directly contrary to Supreme Court and federal appellate decisions both within and without the Eleventh Circuit. This Court should grant certiorari to resolve the conflict over the appropriate standard, apply the stricter standard, and reinstate the jury's verdict.

CONCLUSION

For the reasons set for above, Petitioner respectfully requests that his petition be granted, and that certiorari issue to the United States Court of Appeals for the Eleventh Circuit to review the appeals court's decision affirming the grant of a new trial below.

Respectfully submitted,

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August 20, 2001

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-14355

D.C. Docket No. 94-06333-CV-NCR

KENNETH WEISS,

Plaintiff-Appellant,

versus

REN CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(March 8, 2001)

Before EDMONDSON, BLACK and MCKAY[1], Circuit Judges.

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[1] Honorable Monroe G. McKay, U.S. Circuit Judge for the Tenth Circuit, sitting by designation.

PER CURIAM:

Appellant Kenneth Weiss appeals the district court's grant of Appellee REN Laboratories' post-trial motion for judgment as a matter of law and, in the alternative, the district court's grant of Appellee's motion for a new trial. Appellant seeks reinstatement of the jury verdict and remand for entry of judgment, as well as an award of costs and attorney's fees. Appellant brought suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, claiming religious discrimination was the cause of Appellant's termination from employment with Appellee. The jury returned a verdict in favor of Appellant. While we reverse the district court's grant of judgment as matter of law, we affirm the district court's grant of a new trial and remand for a new trial.

I. JUDGMENT AS A MATTER OF LAW

This Court reviews de novo a district court's grant of judgment as a matter of law, applying the same legal standards as those used by the district court. *See Taylor v. Runyon,* 175 F.3d 861, 865 (11th Cir. 1999).

Judgment as a matter of law is warranted "[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on the issue...." Fed. R. Civ. P. 50(a)(1). We have explained:

> If the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict, then the motion was properly granted. Conversely, if there is substantial evidence opposed to the motion such that reasonable people, in the exercise of impartial judgment, might reach differing conclusions, then

> such a motion was due to be denied and the case was properly submitted to the jury.

Carter v. City of Miami, 870 F.2d 578, 581 (11th Cir. 1993) (quoting *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 679 n.1 (11th Cir. 1984)). In making this assessment, we consider the evidence in the light most favorable to the non-moving party, here, Appellant. *See Combs v. Plantation Patterns*, 106 F.3d 1519, 1526 (11th Cir. 1997). In considering a grant of judgment as a matter of law, a court may not weigh the evidence or assess the credibility of witnesses. *See Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 439 (11th Cir. 1996).

We conclude reasonable jurors could have found, by a preponderance of the evidence, that (1) Appellant satisfactorily performed his job, (2) he did not harass his co-workers, and (3) religion made a difference in Appellee's decision to terminate Appellant.[2] We reach this conclusion due to the requirements under the judgment as a matter of law standard that we not weigh the evidence and that we consider the facts in the light most favorable to Appellant.

Under this standard, we are bound to accept Appellant's version of the disputed facts in this case. With respect to Appellant's competence in performing his job, we must accept Dr. Brian Walter's testimony that Appellant was a "technically sound... medical technologist." We also accept Pamela McDaniel's testimony that all laboratory employees make mistakes "once in a while," and that Appellant is "an accurate and good technical employee."

With respect to whether Appellant harassed his co-workers, the standard of review requires that we accept Appellant's

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[2] This is the three-part, special verdict delivered by the jurors here.

assertion that he never discussed religion with a co-worker when Appellant knew or should have known that such a discussion was offensive to that individual. We must also accept the following of Appellant's statements: Jahved Quershi, a Moslem co-worker and, later, subordinate of Appellant, rejected Appellant's offer of a Bible saying "no thank you," and Appellant did not insist Quershi take the Bible; Appellant never told Jane Christy, an openly homosexual co-worker, that she would burn in hell or that he would cure her homosexuality; co-workers with whom Appellant prayed consented to or requested their praying together and were not offended by Appellant's behavior; and Appellant's only interaction with Claudette Cannatella at the farewell party was his agreeing with Virginia Savino's remark that "it's good to attend church."

With respect to whether religion made a difference in Appellant's termination, we must accept Appellant's testimony that he believed he was terminated because of his religion.

Viewing the facts in the light most favorable to Appellant, and absent any weighing of evidence, we reverse the district court's grant of judgment as a matter of law for Appellee.

II. NEW TRIAL

The standard we use in reviewing the grant of a motion for a new trial differs markedly from that in reviewing the grant of a motion for judgment as a matter of law. First, as a general matter, we review motions for a new trial under the abuse of discretion standard. *See, e.g., Rosenfield v. Wellington Leisure Prods, Inc.*, 827 F.2d 1493, 1498 (11th Cir. 1987). Where the district court has granted a motion for a new trial, "our review is broader and requires a stringent application of the [abuse of discretion] standard" in order "to protect the litigant's right to a jury trial." *Hewitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1556 (11th Cir.

1984).

Second, while a court reviewing a motion for judgment as a matter of law may not weigh the evidence, a court reviewing a motion for a new trial is permitted to weigh the evidence. *See Bazile v. Bisso Marine Co., Inc.,* 606 F.2d 101, 105 (5th Cir. 1979) (citation omitted).[3] A new trial is warranted if the jury verdict is contrary to the great weight of the evidence. *See Rosenfield,* 827 F.2d at 1497-98; *Williams v. City of Valdosta,* 689 F.2d 964, 973 (11th Cir. 1982). In weighing the evidence, courts must examine both the evidence favoring the moving party and that favoring the jury verdict. *See id.* A court may conclude a jury verdict is contrary to the great weight of the evidence even if the record contains some evidence supporting the jury verdict. *See Ard. v. Southwest Forest Indus.,* 849 F.2d 517, 521 (11th Cir. 1988). Courts reviewing motions for a new trial, therefore, are afforded much greater leeway in assessing evidence than are courts reviewing motions for judgment as a matter of law. *See Dudley v. Wal-Mart Stores, Inc.,* 166 F.3d 1317, 1320 n.3 (11th Cir. 1999) (the law applies a less stringent standard to motions for a new trial than to motions for judgment as a matter of law).

In weighing the evidence here, we need not look any further than the undisputed facts in this case. *See generally Ard,* 849 F.2d at 521. With respect to Appellant's competence in performing his job, it is uncontroverted that Appellant received three warnings regarding his job performance. These warnings were issued on October 5, 1992 (failed to perform a hepatitis test), February 17, 1993 (reported an incorrect HIV result), and July 14, 1993 (left his

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[3] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

shift early). It is also undisputed that these three warnings were written. It is uncontroverted that Appellant was twice suspended in conjunction with warnings (February 17, 1993, and July 14, 1993). The parties agree that, in August 1992, Appellant was counseled by Dr. Walters regarding, at least in part, his religions conversations ("sex, religion, and politics are best kept out of the workplace"). Many of these incidents occurred after Appellant's promotion in November 1992. Further, the parties agree that there was an unpleasant encounter between Appellant and Mary Piccola on July 21, 1993. While most of the details about this encounter are disputed, the parties agree Appellant raised his voice to his superior and struck his hand on her desk.

With respect to whether Appellant harassed his co-workers, both parties agree that Appellant offered a Christian Bible to Jahved Quershi, a co-worker and, later, a subordinate of Appellant. While Appellant testified that Quershi politely declined the Bible, Appellant also knew that Quershi was a practicing Moslem and prayed regularly. Appellant should have known that a practicing Moslem would, at the very least, not appreciate Appellant's unsolicited offer of a Christian Bible. With his knowledge of Quershi's religion, Appellant's gesture takes on tones of proselytization.

The parties are also in agreement that Appellant pointed out a Biblical passage from *Romans* regarding homosexuality to Christy, an openly homosexual subordinate employee. The Biblical passage Appellant cited indisputably views homosexuality in a negative light, calling homosexuality "vile," "unseemly," "erro[neous]," and requiring "recompence [sic]".[4] Since Appellant's discussion of

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[4] Appellant testified he cited a passage from "Roman I," and there is only one passage in the first chapter of *Romans* that refers to homosexuality. The full passage reads: "For this cause god gave

homosexuality was admittedly couched in this non-approving framework, it follows that Appellant's portrayal of homosexuality was negative, and therefore, inappropriate in a work setting. Appellant's behavior is particularly unacceptable when directed toward subordinates, such as Quershi and Christy, since Appellant should have known his subordinates might not object to their supervisor's overtures, concerned that he might penalize them.

Next, the parties agree that Appellant "laid hands" on co-workers in an attempt to heal them. Specifically, Appellant testified that, on at least two occasions, he unsolicitedly asked sick co-workers if he could pray for or with them.[5] Initiating a prayer session in a place of employment – even if co-workers agree to participate – is not prudent behavior. Co-workers may have felt pressured to acquiesce to Appellant's overture to "lay hands" on them. The workplace is a highly inappropriate setting to be making such overtures in the first place, especially without knowledge of the religious inclinations of one's co-workers.

Finally, both parties agree that Appellant's supervisors informed

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them up unto vile affections: for even their women did change the natural use into that which is against nature: And likewise also the men, leaving the natural use of the woman, burned in their lust toward one another; men with men working that which is unseemly, and receiving in themselves that recompence of their error which was meet." *Romans* 1:26-27 (King James).

[5] One incident involved Pamela McDaniel and Mary Piccola, and the other involved a unidentified woman "with blood in her eye". While Appellant portrays these two prayer sessions as consensual, Joan Caruso testified that, in a separate incident, Appellant unsolicitedly placed his hands on her with the intent of healing her. Appellant allegedly did so after Caruso mentioned to employees in a lounge that she had a migraine headache. Appellant did not recall this alleged incident.

him on April 21, 1993, that at least one co-worker had filed a complaint, claiming he or she had been offended by Appellant's discussion of religion.

We conclude the jury's verdict that religion made a difference in Appellant's termination is contrary to the great weight of the evidence, which strongly suggests Appellant was terminated for poor job performance, insubordination, and religious harassment of co-workers, as alleged by Appellee. We reach this conclusion after considering Appellant's self-serving testimony that he was terminated because of his religion.

III. CONCLUSION

"If the appellate court reverses the judgment [as a matter of law], nothing in this rule precludes it from determining that the appellee is entitled to a new trial...." Fed. R. Civ. P. 50(d). Viewing the facts in the light most favorable to Appellant and refraining from weighing evidence, as we must, we conclude the district court erred in granting Appellee's motion for judgment as a matter of law. Focusing on the undisputed facts and weighing the evidence, we conclude, however, the district court did not abuse its discretion in granting Appellee's motion for a new trial. We emphasize we do not take a position of the propriety of granting a motion for judgment as a matter of law or a motion for a new trial following the new trial ordered here. The subsequent trial will generate a new record and may reveal new evidence, thereby demanding a different result than that reached here.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED FOR A NEW TRIAL.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-14355-CC

KENNETH WEISS,

Plaintiff-Appellant,

versus

REN CORPORATION,

Defendant-Appellee.

FILED
U.S. COURT OF
APPEALS
ELEVENTH
CIRCUIT

MAY 21 2001

On Appeal from the United States District Court for the
Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: EDMONDSON, BLACK and MCKAY*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this

panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____/S/_____
UNITED STATES CIRCUIT JUDGE

*Honorable Monroe G. McKay, U.S. Circuit Judge for the Tenth Circuit, sitting by designation.

C1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 94-6333-CIV-ROETTGER

KENNETH WEISS,

Plaintiff,

vs.

REN LABORATORIES OF
FLORIDA, INC.

Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION
FOR JUDGMENT AS A MATTER OF LAW

THIS MATTER is before the Court on Defendant's Motion for Judgment as a Matter of Law or in the Alternative a New Trial. (DE 206.) Kenneth Weiss ("Plaintiff") claimed that Ren Laboratories of Florida, Inc. ("Defendant") terminated his employment on July 23, 1993 "solely due to his religious beliefs," in violation of Title VII of the Civil Rights Act of 1964, as amended. Pursuant to the consent of the parties, the undersigned conducted the trial of this matter on February 8 through February 11, 1999, following which the jury returned a verdict for Plaintiff.

Defendant moved for judgment as a matter of law at the close of Plaintiff's case-in-chief, at the close of all the evidence, and

following the jury's verdict. The Court deferred ruling on the motions and, following the verdict, informed the parties that it would entertain full briefing on the motions. On April 9, 1999, Defendant filed its Memorandum of Law in Support of Defendant's Motion for Judgment as a Matter of Law or in the Alternative a New Trial. On May 3, 1999, Plaintiff filed his opposition memorandum, and on May 10, 1999, Defendant replied thereto.

Having reviewed the parties' respective memoranda and thoroughly considered the record herein, the Court finds that Plaintiff failed to introduce substantial evidence to permit a reasonable factfinder to conclude that two of Defendant's proffered reasons for termination - religious harassment and insubordination - were not what motivated its conduct. Accordingly, the Court GRANTS Defendant's Motion for Judgment as a Matter of Law. Further, should this judgment be reversed, the Court conditionally GRANTS Defendant's Motion for a New Trial as the jury verdict was against the great weight of the evidence.

A. STATEMENT OF FACTS

On February 8, 1999, the Court commenced the trial. Both parties presented opening statements to the jury, followed by their respective cases-in-chief and by a brief rebuttal. Plaintiff's presentation consisted of four lay witnesses, including Plaintiff Weiss, and one expert; only the four lay witnesses testified to liability issues. Defendant's presentation consisted of eight witnesses; only six of the witnesses testified to liability issues.[1]

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[1] Plaintiff's expert witness (Dr. John R. Williams) and two of Defendant's witnesses (Diana Bryzicki and Alice Bering) testified to damages issues only. Their testimony, therefore, is not relevant for purposes of this Order.

A. Plaintiff's Case-In-Chief

1. Virginia Savino

Virginia Savino is Plaintiff's former wife. They were married in July 1993, just prior to Plaintiff's termination, and divorced in July 1997. Savino testified about a discussion involving herself, Plaintiff, and Claudette Cannatella on July 22, 1993, the day preceding Plaintiff's termination. This was Cannatella's first day of work, and she had met Plaintiff for the first time that evening. According to Savino, she commented on the cross that Cannatella was wearing. Cannatella reportedly responded that she did not attend church regularly but should do so. Savino stated that Plaintiff voiced agreement. In Savino's opinion, Cannatella did not appear to be upset.

1. Pam McDaniel

Pam McDaniel was the only member of Defendant's management team to be called during Plaintiff's case-in-chief. As the former day shift supervisor, she knew Plaintiff well. McDaniel's testimony revealed the following details of Plaintiff's religious harassment of co-workers, subordinates, and supervisors:

- Plaintiff harassed several gay employees, including Joan Caruso and Jane Christy, on the basis of religion, and they complained to McDaniel in the Summer/Fall of 1992 and the Spring of 1993;
- Plaintiff repeatedly held unwelcomed religious discussions with Javed Quershi, a Muslim employee, and Plaintiff failed to stop when

requested to do so; Plaintiff then attempted to give him a Bible, which he refused; Quershi complained to McDaniel about this harassing conduct;

- in August 1992, McDaniel was present with Jackie Creola for an oral warning given to Plaintiff about unwanted religious discussion with co-workers;
- in November 1992, Defendant promoted Plaintiff from medical technologist to evening shift supervisor due to his good technical skills, despite the previous oral counseling about religious harassment;
- in February 1993, Plaintiff prayed over a broken coagulant machine instead of calling the service repairman, which unnecessarily disrupted the work for the following shift;
- in April 1993, McDaniel and Mary Piccola (the laboratory manager) orally counseled Plaintiff after they had received several employee complaints about his religious harassment; Plaintiff, however, did not take the warning seriously, sarcastically inquiring whether he was permitted to talk about baseball with employees; Piccola gave Plaintiff a written warning regarding his harassing conduct;
- several co-workers and subordinates were afraid to complain about Plaintiff because he was their supervisor and, therefore, could affect the terms and conditions of their employment;

- on July 21, 1993, Plaintiff became violent and insubordinate toward Piccola at a counseling session attended by McDaniel; Plaintiff pounded his fist and appeared to be going over a desk to strike Piccola; Piccola touched his face to keep from getting hit; thereafter, McDaniel was afraid to be in the same room with Plaintiff.

McDaniel testified that Defendant permitted non-harassing speech in the workplace, as long as it did not interfere with the job. Employees, including Plaintiff, who engaged in consensual religious discussions were neither counseled nor disciplined. But McDaniel stated that many of Plaintiff's conversations about religious matters were not consensual; they were harassing and offensive, requiring Defendant's intervention.

3. Claudette Cannatella

Cannatella testified that on her first day at work she was introduced to Plaintiff at a farewell party for another employee, and she was informed that he (Plaintiff) was the night supervisor. According to Cannatella, Plaintiff commented upon her crucifix and then proceeded to inquire whether she was a Christian and whether she attended church. Cannatella replied that she was a Catholic and had not been to church for a long time. Plaintiff then repeatedly urged her to attend church. According to Cannatella, Plaintiff just went "on and on," making her feel uncomfortable. On her way home from work that evening, Cannatella called Debbie Correggio, a supervisor, and asked whether she would have to deal with such harassment on a daily basis. Correggio conveyed the complaint to Mary Piccola, the laboratory manager. Piccola later inquired of

Cannatella about the incident.

4. Plaintiff Kenneth Weiss

Plaintiff testified that he became a born-again Christian in 1977 and between 1989 and 1991 received the "baptism of the Holy Spirit." Plaintiff testified that as a born-again Christian he believes that he is required to witness and share his religious beliefs with others, including co-workers.

On July 16, 1992, Plaintiff was hired by Defendant as a medical technologist on the evening shift at its Fort Lauderdale laboratory. He admitted receiving an employee handbook and stated that he was familiar with and understood its provisions concerning acceptable workplace conduct. He acknowledged that he was required to comply with Defendant's policies and procedures, including its anti-harassment policy. He never complained to Defendant that its policies and procedures conflicted with his religious beliefs.

Soon after going to work for Defendant, Plaintiff began discussing his religious beliefs with co-workers, subordinates, and supervisors and giving unsolicited Bibles. He admitted showing Jane Christy, an openly gay subordinate employee, biblical passages concerning homosexuals. Plaintiff also attempted to "lay hands" on people at work to pray for them, and he did "lay hands" on a broken coagulant instrument during his shift in front of other employees.

Plaintiff admitted that in August 1992 he was orally counseled by Dr. Brian Walters, who told him that "sex, religion, and politics are best kept out of the workplace." In 1992, he also received a written warning for failing to perform a hepatitis test. Nonetheless, in November 1992, Defendant promoted Plaintiff to a supervisory position.

Plaintiff acknowledged that as a supervisor he was in a position to evaluate employees, approve raises, and authorize terminations. Furthermore, he was a role model for other employees and was responsible for maintaining a harassment-free workplace. Yet, in his supervisory capacity, he received a written warning and suspension for reporting out an incorrect HIV result in February 1993. And he acknowledged an April 1993 counseling with Mary Piccola and Pam McDaniel, at which time they informed him of a complaint from an employee who had been offended by his religious discussions. Plaintiff denied that Piccola had showed him an e:mail from Defendant's headquarters, stating that the company did not tolerate harassing behavior. Plaintiff acknowledged that a few months after the April counseling, he received a written warning and suspension for leaving his shift early on July 14, 1993. Finally, Plaintiff admitted that at a July 21, 1993 meeting with Piccola and McDaniel he slammed his hand down on the table.

Plaintiff also testified about the events concerning Claudette Cannatella at the July 22, 1993 farewell party. He stated that his wife, Virginia Savino, had questioned Cannatella about the cross around her neck and that Cannatella did not appear to be upset. According to Plaintiff, when he came to work the following day, Piccola terminated him.

Weiss believes that he was terminated solely because of his religion. He bases his conclusion upon the capitalized word "RELIGION" in the termination notice. Among other things, the notice states that Plaintiff was terminated for "discussing RELIGION with other employees." He stated that his claim for religious discrimination pertained only to his July 23, 1993, termination.

Weiss testified that he recognized there is a time and place for religious discussion. He stated that he never discussed religion when he knew it was offensive to others. He denied ever receiving

a written warning that his religious activities might affect his employment. He also denied telling Jane Christy, an openly gay employee, that she would burn in hell. And he denied commenting on Cannatella's cross or the church she attended.

Following Plaintiff's testimony, he rested his case. Defendant moved for judgment as a matter of law, and this Court deferred argument and reserved ruling. Defendant then proceeded to its case-in-chief.

B. Defendant's Case-In-Chief

1. Evelyn Roby

Roby was a supervisor during Plaintiff's employment at Defendant's laboratory. Roby testified that she personally had several consensual conversations with Plaintiff about religion. But Roby further testified to witnessing Plaintiff initiate unwelcomed and harassing religious discussions with Jane Christy and Carol Kelsy in the laboratory lunchroom. According to Roby, she witnessed Plaintiff telling Christy, one of his subordinates, that according to the Bible she was going to go to hell because she was gay. Christy became very upset at Plaintiff's comment and stated that she was going to inform Piccola. Furthermore, Plaintiff upset Carol Kelsy by condemning her dating habits; he did so "every time he talked to her." Kelsy reportedly also took her grievances to Piccola.

2. Javed Quershi

Javed Quershi is a Muslim employee who worked in very close proximity to Plaintiff, both as a co-employee and as his subordinate. Quershi testified that most of the time Plaintiff spoke to him about his religion; Plaintiff would condemn all other faiths. Quershi stated

that he repeatedly attempted to stop Plaintiff; but Plaintiff refused to stop. On one occasion, Plaintiff handed Quershi a Bible, which Quershi refused. Quershi testified that he was offended by and resented Plaintiff's incessant, unwelcomed expressions of religious faith. As Quershi explained: "What you need to understand you are trying to get your work done and he constantly pounding, pounding, pounding, you know, the only way was to get out of the room for a couple of minutes." Because Plaintiff refused to stop, Quershi ultimately brought his complaints about Plaintiff's harassing conduct to Pam McDaniel in the Fall of 1992 and to Mary Piccola in 1993. According to Quershi, had Defendant not taken some action to stop Plaintiff's religious harassment, he (Quershi) would have quit his job.

3. Joan Caruso

Joan Caruso was an inventory technician on the day shift at the time Plaintiff was the evening shift supervisor. Because Caruso was working a substantial amount of overtime, she and Plaintiff would often be at the laboratory at the same time. Caruso testified about several harassing experiences she had had with Plaintiff. According to Caruso, Plaintiff would come by her office and initiate unwelcomed religious discussion three or four times per week. She stated that Plaintiff had told her that she was going to go to hell because she was homosexual and that God did not love her. Plaintiff had also told her that he was a prophet and that she should change her lifestyle to be right with God. Against her wishes, he even attempted to lay hands on her to cure her headaches. According to Caruso, the discussions made her "feel horrible,... like [she] was being prosecuted for something that was really none of Ken Weiss' business." Although she repeatedly told Plaintiff that she did not wish to discuss religion with him, he persisted. He

stopped only after she threatened to call the company's telephone number for reporting harassment.

Caruso also testified to witnessing Plaintiff harass Lisa Styles and Jane Christy (Caruso's roommate). On at least a dozen occasions, Plaintiff told Lisa Styles that she was living in sin and that God did not approve. Styles finally reacted by bluntly informing Plaintiff that it was none of his business. Styles also complained to McDaniel.

According to Caruso, she and others were initially reluctant to complain to management about Plaintiff's harassment because he was a supervisor. Notwithstanding this reluctance, Caruso did complain to Jackie Creola in the Fall of 1992, to Mary Piccola in 1993, and to Pam McDaniel on several occasions in 1992 and 1993. She specifically informed Piccola that Plaintiff had called her "an abomination." She testified that if Defendant had not put an end to Plaintiff's harassment, she would have sued the company for allowing it to continue and not protecting her rights.

4. Dr. Brian Walters

Dr. Brian Walters is the director of microbiology and immunology at Defendant's laboratory. According to Dr. Walters, Pam McDaniel had received complaints from staff members about Plaintiff discussing religion in an excessive manner. He testified that he warned Plaintiff in August 1992 about his unwelcomed expressions of religious faith to various coworkers. Dr. Walters told Plaintiff it was not a good idea to talk about sex, religion, and politics in the workplace. Dr. Walters stated that Plaintiff agreed with him and was apologetic. Shortly thereafter, in November 1992, Defendant promoted Plaintiff to evening shift supervisor.

5. Debbie Correggio

Debbie Correggio had worked for Defendant for nine years as a laboratory coordinator. Correggio testified that she had received a call from Claudette Cannatella at approximately 10:00 p.m., on July 22, 1993. Cannatella was upset because Plaintiff had reportedly been pushy about her not attending church on a regular basis and about the cross she wore around her neck. According to Correggio, Cannatella was bothered by Plaintiff's religious discussions and wanted to know if she was "going to have to deal with [similar comments from Plaintiff] every day." Correggio stated that she relayed Cannatella's complaints to Mary Piccola, the laboratory manager, because she considered the matter serious.

6. Mary Piccola

Mary Piccola was hired as a vice president of operations at Defendant's laboratory in January 1993 and was responsible for all issues arising in the workplace. Piccola made the final decision to terminate Plaintiff in July 1993.

Piccola testified about Defendant's employee handbook, policies, and procedures, including the company's anti-harassment policies. Piccola stated that she spoke to Plaintiff on several occasions about complaints she had received from staff members concerning his religious harassment. Piccola testified that Plaintiff personally offered her a Bible in February 1993, which she declined to accept; Plaintiff, however, refused to take it back. Plaintiff also asked if he could lay hands on her to cure her cold; Piccola declined. Piccola told Plaintiff that he could discuss religion with those who were willing to do so but that he could not discuss religion with those who indicated that they did not wish to do so. She warned Plaintiff that he could be terminated if he did not stop

harassing those not wishing to partake in these discussions.

Piccola identified an e:mail that she received from Defendant's corporate headquarters concerning the proper way to handle Plaintiff's harassing conduct. The e:mail was prompted by Pam McDaniel's report that Plaintiff had been harassing staff members. The human resources personnel at corporate headquarters instructed Piccola to speak to Plaintiff immediately to stop the harassment; otherwise, Defendant risked liability. Piccola and McDaniel (in April 1993) then met with Plaintiff. Piccola told Plaintiff that corporate policy prohibited his harassing employees. She reiterated that he could engage in consensual religious discussions but could not discuss religion with those who indicated that they did not wish to do so. And she again warned Plaintiff that he could be terminated if he continued to harass.

Piccola related a July 1993 incident in which Plaintiff had left his shift early even though a significant amount of work remained. Plaintiff was suspended for this breach of policy, and he received a written warning for it on July 21, 1993. Piccola and McDaniel then met with Plaintiff to discuss the suspension. According to Piccola, Plaintiff slammed his fist down on the desk, frightening her and making her jump. Piccola stated that she and Plaintiff stood up and that she was unable to leave the room. At several times, she told Plaintiff that he needed to leave. The incident so startled McDaniel that she would not return to talk to Plaintiff. The following day, Piccola, this time accompanied by Andrew Grant, met with Plaintiff again. Piccola informed Plaintiff that his violent behavior would not be tolerated; Plaintiff apologized.

On July 23, 1993, Debbie Correggio advised Piccola that Plaintiff reportedly had been discussing religion aggressively with Claudette Cannatella. Piccola spoke to Cannatella, who stated that she did not want to come to work every night and be forced to deal with such religious discussions; they made her feel very

uncomfortable. Piccola then discussed Cannatella's complaint with Plaintiff to verify the allegations. Piccola testified that Plaintiff did not deny discussing religion with Cannatella. According to Piccola, the Cannatella incident was "a recurrence of a problem that had been discussed many times with [Plaintiff]."

Piccola stated that Plaintiff's termination was based not solely on his conversation with Cannatella, but on his on-going religious harassment, as well as his insubordination and poor performance. With respect to the termination notice that she prepared, Piccola testified that her practice is not to list every reason on the notice because the employee file references prior warnings and counselings. She explained that she wrote "RELIGION" in capital letters on the notice because Plaintiff had been counseled several times that he could not engage in unwanted or unwelcomed religious discussions, yet he continued to do so anyway; the Cannatella incident was merely the last straw. Finally, she testified that her termination of Plaintiff had nothing to do with his being a born-again Christian or with any of the consensual religious discussions he may have had with other employees.

At the conclusion of Piccola's testimony, Defendant rested its case. Defendant then renewed its motion for judgment as a matter of law, arguing that the record contained no evidence of intentional religious discrimination. This Court again deferred argument and reserved ruling.

C. Plaintiff's Rebuttal Case

Plaintiff was the only witness who testified during his rebuttal case. He was asked approximately ten questions by his counsel, and defense counsel conducted no cross-examination. His rebuttal testimony addressed whether he should have been disciplined for leaving work early in July 1993 and for calling a physician on a

panic value reading in the early morning hours. Plaintiff also testified that he always obeyed and followed the rules of the laboratory and never signed a written warning concerning his harassing employees.

After Plaintiff rested, Defendant again renewed its motion for judgment as a matter of law, and this Court again deferred argument and ruling. The parties then proceeded to closing argument, and the Court instructed the jury.

The jury returned a verdict in favor of Plaintiff. Defendant again moved for judgment as a matter of law. The Court stated that it would not then require Defendant to place all of its reasons on the record and requested that the parties prepare a briefing schedule for all post-trial motions.

II. STANDARD OF REVIEW

Pursuant to Rule 50 of Federal Rules of Civil Procedure, a judgment as a matter of law is warranted if "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a)(1). A court reviewing a motion for judgment as a matter of law must

> consider all the evidence, and the inferences drawn therefrom, in the light most favorable to the nonmoving party. If the facts and inferences point overwhelming in favor of one party, such that reasonable people could not arrive at a contrary verdict, then the motion [is] properly granted. Conversely, if there is substantial evidence opposed to the motion such that reasonable people, in the exercise of impartial judgment, might reach different conclusions, then such a motion [is]

to be denied....

Combs v. Plantation Patterns, 106 F.3d 1519, 1526 (11th Cir. 1997), cert. denied, ___ U.S. ___, 118 S.Ct. 685, 139 L.Ed.2d 632 (1998) (quoting Carter v. City of Miami, 870 F.2d 578, 581 (11th Cir. 1989))(emphasis added). Accordingly, the nonmoving party "must provide more than a mere scintilla of evidence to survive a motion for judgment as a matter of law"; "there must be a substantial conflict in the evidence to support a jury question." Id. (quoting Carter, 870 F.2d at 581)(internal quotation marks omitted).

Here, Plaintiff's religious discrimination claim is grounded in circumstantial evidence. Under the framework established by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207(1981), Plaintiff had the initial burden of establishing a prima facie case of discrimination. Combs, 106 F.3d 1527-28 (citations omitted). Establishing a prima facie case creates a presumption of unlawful discrimination. Id. at 1528 (citation omitted). The effect of the presumption is to shift to the defendant the burden of producing legitimate nondiscriminatory reasons for the challenged employment action. Id. (citations omitted). Once the defendant satisfies this intermediate burden of production, the presumption of discrimination drops from the case. Id. at 1528 (citation and quotation marks omitted). The plaintiff then has the opportunity to come forward with evidence "sufficient to permit a reasonable factfinder to conclude" that the defendant's explanation is pretextual. Id.

"Pretext... means a lie, specifically a phony reason for some action." Helland v. South Bend Community Sch. Corp., 93 F.3d 327, 330 (7th Cir. 1996), cert. denied, 519 U.S. 1092, 117 S.Ct.

769, 136 L.Ed.2d 715(1997)(citation and internal quotation marks omitted). "Because a Title VII claim requires intentional discrimination, the pretext inquiry focuses on whether the employer's stated reason was honest, not whether it was accurate." Id. As articulated by this Circuit, the focus is on whether "the employer's proffered 'legitimate reasons were not what actually motivated its conduct.'" Combs, 106 F.3d at 1538 (citing Cooper-Houston v. Southern Ry. Co., 37 F.3d 603, 605 (11th Cir. 1994)). The "court must evaluate whether the plaintiff has demonstrated such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." Id. (citation and internal quotation marks omitted). If the (nonmoving) plaintiff does not "undermine the veracity of [the defendant's] claimed reliance" on its stated reason(s), then the defendant is entitled to judgment as a matter of law. Id. at 1544 (Black, J., concurring).

Where the record does not support granting a judgment as a matter of law, it may nonetheless support granting a new trial if the jury verdict is contrary to the "great weight" (not merely the greater weight) of the evidence. See Rosenfield v. Wellington Leisure Prods., Inc., 827 F.2d 1493, 1497-98 (11th Cir. 1987); Williams v. City of Valdosta, 689 F.2d 964, 973 (11th cir. 1982); Arnold v. Rayonier, Inc., 181 F.R.D. 549, 553 (S.D. Ga. 1998). The law applies "a less stringent standard... to a motion for a new trial than to a motion for judgment as a matter of law." Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1320 n.3 (11th Cir. 1999) (citation omitted). And unlike motions for judgment as a matter of law, motions for a new trial permit courts to weigh or reexamine the evidence. See Rabun v. Kimberly-Clark Corp., 678 F.2d 1053, 1060 (11th Cir. 1982); Arnold, 181 F.R.D. at 553. In weighing the evidence, courts examine not only the evidence favoring the jury

verdict, but the evidence favoring the moving party as well. Williams, 689 F.2d at 973. Courts, however may not substitute their own credibility choices and inferences for those of the jury. Id. at 973-74 n.7; Arnold, 181 F.R.D. at 553.

After weighing the evidence, a court may conclude that a jury verdict is contrary to the great weight of the evidence - thereby warranting a new trial - even though the record does contain some evidence supporting the verdict. See Ard v. Southwest Forest Indus., 849 F.2d 517, 521 (11th cir. 1988)(district court properly granted new trial in age discrimination case; although plaintiffs had introduced some evidence showing that employer's proffered reason for discharge was pretextual, the evidence was weak and attenuated). But in assessing a new trial motion, a court must give greater deference to a jury verdict where the case involved "simple issues, highly disputed facts, and... an absence of 'pernicious occurrences.'" Williams, 689 F.2d at 974. By contrast, a trial court has greater freedom to independently evaluate a jury verdict where the case involved "complex issues, facts not highly disputed, and events arguably marred by error." Id.

III. ANALYSIS

A. Judgment as a Matter of Law

Assuming, arguendo, that Plaintiff established a prima facie case of religious discrimination, the production burden shifted to Defendant to proffer legitimate, nondiscriminatory reasons for the July 23, 1993 termination. Defendant proffered that it terminated Plaintiff for religious harassment and insubordination,[2] both of which

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[2] Defendant also proffered that it terminated Plaintiff for poor performance. The court, however, need not address this issue as

are legitimate, nondiscriminatory reasons. See, e.g., Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1019-1020 (4th cir. 1996), cert denied ___ U.S. ___, 118 S.Ct. 58, 139 L.Ed.2d 21 (1997) (upholding termination of Evangelical christian for "sending personal, distressing letter to coworkers' homes, criticizing them for assertingly ungodly, shameful conduct"; plaintiff supervisor had acknowledged responsibility to "promote harmony in the workplace"); Helland, 93F.3d at 330 (defendant's claims that plaintiff's performance was poor and he defied repeated warnings against interjecting his religious beliefs into the classroom were legitimate, nondiscriminatory reasons to defeat plaintiff's claim of religious discrimination); Fouraker v. Publix Super Markets, Inc., 959 F. Supp. 1504 (M.D. Fla. 1997)(plaintiff's failure to follow employer's directive to cease certain conduct was considered insubordination and a legitimate, nondiscriminatory reason for termination); Woodbury v. Sears Roebuck & Co., 901 F.Supp. 1560, 1564 (M.D. Fla. 1995)(insubordination is a legitimate, nondiscriminatory reason for termination).

Once Defendant satisfied its production burden, "the presumption of discrimination drop[ped] from the case and the factual inquiry proceed[ed] to a new level of specificity." Combs, 106 F.3d at 1528 (citation omitted). To prevent entry of judgment as a matter of law, Plaintiff was then required to put forth sufficient evidence showing that each of Defendant's proffered reasons for the termination was not "the real reason for the adverse employment decision." Id. (citations omitted). Plaintiff, however, failed to do so.

Defendant produced abundant evidence supporting its assertion

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Plaintiff failed to undermine the veracity of Defendant's other stated reasons for the termination. See Combs, 106 F.3d at 1543 (a plaintiff must discredit "all" of the defendant's reasons for its actions).

that it terminated Plaintiff for religious harassment: he repeatedly condemned two homosexual women (Caruso and Christy) (one of whom was his subordinate) and two heterosexual women (Kelsy and Stiles) about their personal lifestyles; he continually tried to convert a Muslim subordinate (Quershi); he attempted to lay hands on employees; he gave unsolicited Bibles (and refused to take one back); and he harassed a new employee (Cannatella) on her first day at work about her religious practices. Plaintiff's behavior put Defendant in a position of possibly losing employees to resignation or, worse, being sued by employees for tolerating a religiously hostile work environment.

Defendant had not only the right, but a legal duty to keep its workplace free of religious harassment. See Weiss v. United States, 595 F. Supp. 1050, 1055-58 (E.D. Va. 1984)(employee prevailed on claim of hostile work environment religious harassment based upon discriminatory comments/conduct by co-workers and supervisor); EEOC Decision Number 72-114, 4 FEP Cas. (BNA) 842, 843 (1972), 1972 WL 4024, at *1 (EEOC Feb. 18, 1972) (charging parties claimed that supervisor was preaching his religious beliefs to them at work; EEOC stated that "employer is responsible for the actions of its supervisors... Respondent's failure to provide a working environment free of religious intimidation is violative of Section 703(a) of Title VII.").

The evidence established that Defendant was genuinely concerned about Plaintiff's harassment. Defendant's own handbook proscribes harassment of any type, and the record contains ample testimony from Piccola, McDaniel, and even Plaintiff himself that workplace harassment was well understood to be unacceptable at the laboratory. Defendant's concern was also evidenced by an e:mail forwarded to Piccola by the corporate office. The e:mail directed Piccola to instruct Plaintiff that Defendant does not tolerate harassment of any kind and that such

conduct must cease.

The evidence further established that Defendant took efforts to address the many complaints of harassment it received. Plaintiff admitted that he was counseled by Dr. Walters in the Fall of 1992 to avoid religious discussions and that he was told by Piccola in April 1993 of a complaint about his religious harassment, for which he apologized. Pam McDaniel testified that she was involved in a counseling session with Plaintiff as early as August 1992 regarding this very issue. And both Piccola and McDaniel testified to counseling Plaintiff in April 1993; they informed him of several complaints by subordinates and co-workers regarding his unwelcomed, harassing religious discussions. Piccola stated that she had also cautioned Plaintiff on other occasions. These repeated warnings not only placed Plaintiff on notice, but they underscore the sincerity of Defendant's concern. When Defendant finally terminated Plaintiff, it cited the harassing discussions and the previous warnings in the termination notice.

Plaintiff failed to cast sufficient doubt on the veracity of Defendant's assertion that it terminated him for religiously harassing employees. Plaintiff produced no evidence to suggest that Defendant did not honestly believe he was harassing its coworkers. Plaintiff did not produce any testimony or exhibit that would demonstrate a weakness, implausibility, inconsistency, incoherency, or contradiction in defendant's stated reason. See Combs, 106 F. 3d at 1538. And although Plaintiff denied that his religious discussions were harassing, his mere denial, standing alone is insufficient for a reasonable jury to find that Defendant's proffered reason for terminating him was a pretext for religious discrimination. See Washington v. Vogel, 880 F. Sup. 1542, 1544 (M.D. Fla. 1995)(mere denial by driver stopped by police officer that he committed traffic violation was insufficient by itself for reasonable jury to find that traffic stop was pretext for national origin

discrimination). Were it otherwise, any plaintiff could get to the jury on a discrimination claim simply by denying the defendant's stated reason for its action. Id. As this Circuit has stated, "[t]hat the plaintiff calls into question some assertions made by the defendant in support of defendant's justification is not enough. The plaintiff must call into question the veracity of the defendant's ultimate justification itself." Isenbergh v. Knight-Ridder Newspaper Sales, 97 F.3d 436, 444 (11th Cir. 1996), cert. denied, 521 U.S. 1119, 117 S.Ct. 2511, 138 L.Ed.2d 1014 (1997) (citation omitted)(emphasis added). Nor does Plaintiff's stated belief that he was terminated "solely due to his religious beliefs" affect the result. "Conclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where [the defendant] has offered extensive evidence of legitimate, nondiscriminatory reasons for its actions." Id.

Defendant also introduced abundant evidence supporting its assertion that it terminated Plaintiff for insubordination. Defendant's management counseled plaintiff on several occasions about his inappropriate religious discussions in the workplace, but the warnings went unheeded. Not only did Plaintiff disregard several informal warnings from management, but he also disregarded Piccola's more formal directive of April 21, 1993 to cease his religious harassment. Piccola cited Plaintiff's continued disregard of these warnings, which culminated in his harassment of Cannatella, as evidence of his insubordination. She memorialized this in the termination notice: "[D]espite at least 2 separate warnings, Mr. Weiss continues to discuss RELIGION with REN employees." Further, Plaintiff was personally insubordinate to Piccola - as evidenced by his angry, table-pounding confrontation - when she attempted to counsel him about his leaving the shift early.

Plaintiff failed to cast doubt on the veracity of Defendant's assertion that it terminated him for insubordination. The only

evidence presented by Plaintiff was his own denial that he commented on Cannatella's church and cross and Savino's testimony that Plaintiff had merely voiced his agreement that Cannatella should attend church more often and that Cannatella did not appear to be upset. Although Plaintiff may disagree with the wisdom of Defendant's assessment of his religious discussion with Cannatella, his disagreement does not establish pretext. As this Circuit has stated, a plaintiff "may not establish that an employer's proffered reason is pretextual merely by questioning the wisdom of the employer's reason, at least not where... the reason is one that might motivate a reasonable employer." Combs, 106 F.3d at 1543. In Defendant's view, Plaintiff's conversation with Cannatella, coming only a day after his angry confrontation with Piccola, manifested a continuing disregard for company policy; it was the last straw. Plaintiff, therefore, failed to produce any evidence showing that the claim of "insubordination" was a front or ruse for unlawful religious discrimination. See Isenbergh, 97 F.3d at 444.

To establish pretext, Plaintiff had to adduce "substantial evidence," see Combs, 106 F.3d at 1526, showing that Defendant "did not honestly believe in its proffered explanation" that it terminated Plaintiff for religious harassment and insubordination. Arnold, 181 F.R.D. at 557 (citing Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991)(stating that the inquiry is "whether the employer gave an honest explanation of its behavior")). Plaintiff, however, failed to produce any evidence from which a rational factfinder could find that Defendant's stated "reasons were not what actually motivated its conduct." Combs, 106 F.3d at 1538 (citation and internal quotation marks omitted). Accordingly, judgment as a matter of law is warranted.

B. New Trial

Should this judgment be reversed, this Court would grant Defendant's motion for a new trial because the jury verdict was contrary the great weight of the evidence.[3] Here the great weight of the evidence shows that Plaintiff was terminated, not because of his religion, but because of his religious harassment of co-workers and subordinates and for insubordination. The evidence shows that after it was fully aware of Plaintiff's religious beliefs, and even after it had cautioned him about religious harassment, Defendant promoted Plaintiff to a supervisory position. But the evidence further shows that he thereafter continued to religiously harass several employees about their sexual preferences, dating habits, living arrangements, and personal faiths and that he continued to disregard company policy.

The record contains the following evidence of Plaintiff's workplace behavior:

- he condemned two female homosexual employees on the basis of religion, telling one that she would burn in hell and calling her "an abomination"; that employee contemplated suing Defendant had they not stopped the harassment;
- he condemned two female heterosexual employees

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[3] Federal Rule of Procedure 50(c)(1) states in pertinent part:

> If a renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the ground for granting or denying the motion for a new trial.

on the basis of religion, criticizing their dating habits and living arrangements;

- he repeatedly held unwanted religious discussions with a Muslim employee in which he condemned all faiths other than his own; the Muslim employee often felt compelled to leave the room to end the discussions and even considered resigning his job;
- he received oral warnings in August 1992 (from McDaniel and Jackie Creola), in the Fall of 1992 (from Dr. Walters), and again in April 1993 (from McDaniel and Piccola) regarding unwanted religious discussions with co-workers and subordinates; he also received several informal warnings from Piccola;
- he received a written warning in October 1992 for failing to run a blood specimen for hepatitis during his shift;
- he received a written warning and suspension in February 1993 for reporting an incorrect HIV result;
- he attempted to lay hands on unwilling employees;
- he disrupted work in February 1993 by praying over a broken coagulant machine rather than calling a service repairman;
- he received a written warning and suspension in July 1993 for leaving his shift early when the staff was overwhelmed with work;
- he was belligerent and hostile to Piccola during a July 21, 1993 meeting; and
- he harassed a new employee on her first day at work about her religious practices.

Plaintiff did testify that his religious discussions were not harassing, and he disputed the merit of his warnings and suspensions. But the issue that was dispositive of this case was neither simple nor the subject of highly disputed testimony. The dispositive issue was the complex one of Defendant's intent - whether Defendant terminated Plaintiff because it intended to discirimate against him on the basis of his religion or because it honestly believed he had been insubordinate and religiously harassing employees. And the facts material to the issue of Defendant's intent were not highly disputed: Plaintiff did commit the acts giving rise to the suspension; Plaintiff did discuss religion in the workplace with some frequency; at least some employees did take offence and reported their displeasure to management; and management did express its concern to Plaintiff by warning him about this behavior. See Williams, 689 F.2d at 974 (court has greater latitude in reviewing jury verdict where issues are complex and facts not highly disputed). Plaintiff, therefore, did not meaningfully dispute the material facts bearing on Defendant's intent and its stated reasons for termination.

The great weight of the evidence supports Defendant's assertion that it terminated Plaintiff, not because of his religion, but because it honestly believed that he had been religiously harassing other employees and had been insubordinate to management. See Arnold, 181 F.R.D at 557. Accordingly, the Court concludes that a new trial would be warranted should the judgment be reversed. See Fed. R. Civ. P. 50(c)(1).

IV. CONCLUSION

For the foregoing reasons, the evidence of record did not allow a reasonable jury to find that Defendant's proffered legitimate, nondiscriminatory reasons were not the real reasons for Plaintiff's

termination. Accordingly, the Court GRANTS Defendant's Motion for Judgment as a Matter of Law. Further, should this judgment to be vacated, this Court conditionally GRANTS Defendant's Motion for a New Trial as the jury verdict was contrary to the great weight of the evidence.

DONE AND ORDERED at Fort Lauderdale, Florida this 24th day of September 1999.

_____/S/_____
BARRY S. SELTZER
United States Magistrate Judge

D1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 94-6333-CIV-ROETTGER

KENNETH WEISS,

Plaintiff,

vs.

REN LABORATORIES OF
FLORIDA, INC.,

Defendant.
_____/

FINAL JUDGMENT

THIS CAUSE came before United States Magistrate Judge Barry S. Seltzer upon Defendant's Motion for Judgment as a Matter of Law or in the Alternative a New Trial (DE 206) pursuant to the consent of the parties. The issues having been duly considered and the Court having found that pursuant to Federal Rule of Civil Procedure 50(a)(1) Defendant Ren Laboratories of Florida, Inc. is entitled to a judgment as a matter of law on Plaintiff Kenneth Weiss's claim under Title VII of the Civil Rights Act of 1964, as amended,

It is ORDERED and ADJUDGED that Plaintiff Kenneth Weiss take nothing and that this action is DISMISSED with prejudice.

DONE AND ORDERED in Fort Lauderdale, Florida, this 24th day of September 1999.

/s/
BARRY S. SELZER
United States Magistrate Judge

E1

COURT'S INSTRUCTIONS TO THE JURY

Members of the jury:

I will now explain to you the rules of law that you must follow and apply in deciding this case.

When I have finished, you will go to the jury room and begin your discussions - what we call your deliberations.

CONSIDERATION OF THE EVIDENCE
DUTY TO FOLLOW INSTRUCTIONS
(Corporate Party Involved)

In deciding the case, you must follow and apply all of the law as I explain it to you, whether you agree with that law or not; and you must not let your decision be influenced in any way by sympathy, or by prejudice, for or against anyone. A corporation and all other persons stand equal before the law and must be dealt with as equals in a court of justice.

When a corporation is involved, of course, it may act only through people as its employees; and, in general, a corporation is responsible under the law for any of the acts and statements of its employees which are made within the scope of their duties as employees of the company.

In your deliberations, you should consider only the evidence - that is, the testimony of the witnesses and the exhibits I have admitted in the record - but as you consider the evidence, both direct and circumstantial, you may make deductions and reach conclusions which reason and common sense lead you to make.

"Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial

evidence" is proof of a chain of facts and circumstances tending to prove, or disprove, an ultimate conclusion.

Remember that anything the lawyers say is not evidence in the case. It is your own recollection and interpretation of the evidence that controls.

CREDIBILITY OF WITNESSES

Now, in saying that you must consider all of the evidence, I do not mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning a particular dispute is not controlling. You may decide that the testimony of a smaller number of witnesses concerning any fact in dispute is more believable than the testimony of a larger number of witnesses to the contrary.

In deciding whether you believe or do not believe any witness I suggest that you ask yourself a few questions: Did the person impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from other testimony or other evidence?

IMPEACHMENT OF A WITNESS
Inconsistent Statement

You should also ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact; or, whether there was evidence that at some other time the witness said or did something or failed to say or do something, which was different from the testimony he or she gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

EXPERT WITNESSES

[Omitted: Liability testimony was confined to lay witnesses]

BURDEN OF PROOF
When Only Plaintiff Has Burden of Proof

In this case it is the responsibility of the Plaintiff to prove every essential part of his claim by a "preponderance of the evidence." This is sometimes called the "burden of proof" or the "burden of persuasion."

A "preponderance of the evidence" simply means an amount of evidence which is enough to persuade you that the Plaintiff's claim is more likely true than not true.

In deciding whether any fact has been proved by a preponderance of the evidence you may consider the testimony of all of the witnesses, regardless of who may have called them, and all of the exhibits received in evidence, regardless of who may have produced them.

If the proof fails to establish any essential part of the Plaintiff's claim by a preponderance of the evidence, you should find for the Defendant as to that claim.

DISPARATE TREATMENT BASED ON RELIGION

In this case, the Plaintiff claims that the Defendant discriminated against him by terminating the Plaintiff's employment because of his religion. As a matter of law, the Court instructs you that it is an unlawful employment practice for REN Laboratories to discharge Ken Weiss because of his religion. The term "religion" includes all aspects of Ken Weiss' religious observance and practice, as well as belief, unless REN Laboratories demonstrates that it is unable to reasonably accommodate Ken Weiss' religious practice without undue hardship on the conduct of REN Laboratories' business.

More specifically, the Plaintiff alleges that he was terminated for discussing religious issues with people at REN Laboratories in an non-offensive manner.

The Defendant denies that Mr. Weiss was terminated for discussing religion in a nonoffensive manner. REN claims that he was terminated for harassing the employees about his religion as well as for insubordination and unsatisfactory performance.

In order to prevail on his claim, the Plaintiff must prove each of

the following things by a preponderance of the evidence.

1. That he was a member of and/or practices a particular religion; and
2. That he was qualified for and satisfactorily performed the job at issue; and
3. That he suffered some adverse employment action; and
4. That someone outside the protected class of which he is a member was treated differently.

You should be mindful that the law requires only that an employer not discriminate against an employee because of his religion. An employer can discharge an employee for any other reason, good or bad, fair or unfair, and you should not second-guess that decision. Neither does the law require an employer to extend any special or favored treatment to employees in the protected religious group.

On the other hand, it is not necessary for the Plaintiff to prove that religion was the sole or exclusive reason for the Defendant's decision, it is only necessary for the Plaintiff to prove that religion made a difference.

If you find that the Plaintiff has established his claim, you will then consider the Defendant's defenses, as to which the Defendant bears the burden of proof by a preponderance of the evidence. The Defendant claims that Plaintiff was discharged not for his religion but for:

1) improper, harassing conduct toward other employees of Defendant,
2) unsatisfactory or inadequate performance, and
3) insubordination.

To summarize, it is the burden of the Plaintiff to prove to your satisfaction by a preponderance of the evidence that the Defendant discriminated against him because of his religion as opposed to harassing conduct, insubordination or harassment.

The parties agree that the Plaintiff was permitted to practice his religion in the workplace to the extent that he did not harass other employees. The parties further agree that the Defendant could lawfully discharge an employee for harassing other employees, for performing his tasks in an unsatisfactory manner, or for insubordinate behavior. It will be up to you, the members of the jury, to determine whether or not Plaintiff harassed other employees, performed his duties in an unsatisfactory manner or behaved in an insubordinate manner.

ACTUAL OR COMPENSATORY DAMAGES

[Omitted]

PUNITIVE DAMAGES

[Omitted]

DUTY TO DELIBERATE
When Only the Plaintiff Claims Damages

[Omitted]

E7

ELECTION OF A FOREPERSON
EXPLANATION OF VERDICT FORM(S)

[Omitted]

JURY VERDICT FORM

Question 1: Do you find from the preponderance of the evidence that Mr. Weiss was qualified for and satisfactorily performed his job?

Yes __X__ No _____

(If your answer to Question No. 1 is "No," sign, date and return this verdict form. If your answer to Question No. 1 is "Yes," then answer Question No. 2.)

Question 2a: Do you find from the preponderance of the evidence that Mr. Weiss harassed other employees?

Yes _____ No __X__

(If your answer to Question No. 2a is "Yes," proceed to Question No. 2b. If your answer to Question No. 2a is "No," then proceed to Question No. 3.)

Question 2b: If you do find from the preponderance of the evidence that Mr. Weiss did harass other employees, do you also find that this was a reason for his termination?

Yes _____ No _____

(If your answer to Question No. 2b is "Yes," sign, date and return this verdict form. If your answer to Question No. 2b is "No," then proceed to Question No. 3.)

Question 3: Do you find from the preponderance of the evidence that religion made a difference in REN's decision to terminate Mr. Weiss?

Yes __X__ No _____

(If your answer to Question No. 3 is "No," sign, date and return this verdict form. If your answer to Question No. 3 is "Yes," answer Question No. 4.)

Question 4: How much if any, compensatory damages is Mr. Weiss entitled to?

4(a) The amount of any wages and fringe benefits Ken Weiss would have earned in his employment with REN Laboratories if he had not been discharged on July 23, 1993, through the date of your verdict.

$ 224,100.00

4(b) Minus the amount of earnings and benefits that Ken Weiss received from other employment during that time.

$ (49,000.00)

4(c) Minus any additional amounts that Ken Weiss would have received had he sought out or taken advantage of opportunities reasonably available to him.

($ 140,000.00)

4(d) The amount of any other damages sustained by Ken Weiss,

such as his mental anguish, emotional pain, suffering, inconvenience, and loss of enjoyment of life.

$ 00.00

(Please fill in the amounts, if any, and proceed to Question No. 5.)

Question 5: Do you find from the preponderance of the evidence that in terminating Mr. Weiss, REN acted willfully, intentionally or with reckless indifference to Plaintiff's rights?

Yes __X__ No _____

(If your answer to Question No. 5 is "Yes," please proceed to Question No. 6. If your answer to Question No. 5 is "No," sign and date the verdict form.)

Question 6: How much, if any, punitive damages is Mr. Weiss entitled to?

$_125,000.00_____
(Please fill in the amount.)

SO SAY WE ALL.

Date: 2/11/99_____Foreperson: _____

G1

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WRITTEN NOTICE OF TERMINATION

NAME: KEN WEISS DATE OF OCCURRENCE: 7/22/93

Supervisor Presenting Notice: Mary Piccola and Brian Walters

1) Behavior resulting in Notice: Despite at least 2 separate warnings, Ken continues to discuss RELIGION with REN employees. Claudette Cannatella expressed her concern and discomfort to her immediate supervisor, Debbie Correggio, regarding Ken Weiss discussing what church she attended. When she said NONE Ken gave her a lecture.

2) Action taken: TERMINATION

SIGNATURE OF PRESENTER Mary Piccola DATE 7/23/93

EMPLOYEE SIGNATURE [signature] DATE 7-23-93

NOTE: EMPLOYEE SIGNATURE ONLY DENOTES ACKNOWLEDGEMENT OF REPORT, NOT AGREEMENT

BEST AVAILABLE COPY

(2)

No. 01-317

Supreme Court, U.S.
FILED
SEP 20 2001
OFFICE OF THE CLERK

In The

Supreme Court of the United States

KENNETH WEISS,

Petitioner,

v.

REN LABORATORIES OF FLORIDA, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS

In his presentation of the parties to this proceeding, Kenneth Weiss ("Mr. Weiss") lists REN Laboratories of Florida, Inc.'s ("REN") parent corporation and states, "[t]here are no other known parent or subsidiary entities to these parties." (Weiss Pet. at ii). In lieu of this statement, REN directs this Court to the Corporate Disclosure Statement filed by REN in its Petition for Writ of Certiorari, Case No. 01-292, which states, "REN Laboratories of Florida, Inc. is now known as Gambro Healthcare Laboratory Services, Inc. Gambro Healthcare, Inc. f/k/a Gambro Healthcare Patient Services, Inc. f/k/a REN Corporation - USA is the parent corporation. There is no publicly held company that owns 10% or more of the company's stock." (REN Pet. at iii).

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STATEMENT OF THE CASE

Instead of setting out again the material facts to the questions presented by this Petition, REN directs this Court to the undisputed facts cited by both the district court and the Eleventh Circuit in this case. (Weiss Pet. at A5-A8 and C23-25).[1] However, in several significant areas REN supplements the statement of facts set forth by Mr. Weiss in his Petition as follows:

Mr. Weiss stresses in several places the importance of the "investigation" undertaken by Dr. Brian Walters ("Dr. Walters"), REN's Medical Director of Microbiology and Immunology, and his "finding" that there was no substance to the allegations of religious harassment by Mr. Weiss. However, Dr. Walters was not officially charged with investigating the complaint. Once the investigation was conducted by another manager, Dr. Walters was asked to talk to Mr. Weiss about unwanted religious discussions with other REN employees. Moreover, Mr. Weiss specifically admitted that he was orally counseled by Dr. Walters regarding unwelcome religious discussions with coworkers and supervisors in the workplace. Mr. Weiss admitted that Dr. Walters told him that "sex, religion and politics are best kept out of the workplace." (R 9/215/247-248).[2] Accordingly, the important fact regarding Dr. Walters' involvement is that it resulted in a warning to Mr. Weiss about holding unwanted religious conversations in the workplace.

Mr. Weiss also specifically failed to refer to the testimony of Evelyn Roby, a supervisor during Mr. Weiss' employment at REN. She testified that REN allowed consensual religious conversations in the workplace, and that she had had several of these conversations with Mr. Weiss. Ms. Roby also testified that she witnessed Mr. Weiss initiate

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[1]REN reserves the right to submit a more detailed fact section, should this Court grant certiorari on the issues presented by Mr. Weiss.

[2]"R" refers to the record filed with the Eleventh Circuit Court of Appeals.

unwelcomed and harassing religious discussions with two of his subordinates. (Weiss Pet. at C8). These material facts were undisputed by Mr. Weiss.

Additionally, there are several instances where Mr. Weiss makes "inferences" about the facts. However, these inferences go beyond reasonable factual interpretation and cross over into argument. Specifically, Mr. Weiss infers that Javed Quershi was "hyper-sensitive" to the discussion of any religion other than his own. (Weiss Pet. at 11). Yet, Mr. Weiss also states that Mr. Quershi simply rejected Mr. Weiss' offer of a Bible saying, "No thank you." (Weiss Pet. at 11). A "hyper-sensitive" Moslem would have a stronger reaction when offered a Christian Bible. Mr. Weiss' factual "inference" here is misleading. In addition, Mr. Weiss infers, without any support, that Mary Piccola, the member of REN management who made the decision to terminate him, "did not like his religion." (Weiss Pet. at 13).[3] However, this is not a factual statement, rather an argument that REN's reasons for terminating Mr. Weiss were a pretext for discrimination. By placing this inference in his recitation of facts, Mr. Weiss substantially misleads the Court. Moreover, there is no proof of pretext in this case.

Finally, it is important to note that there will always be subtle differences in the parties' versions of events, i.e., the conversation Mr. Weiss had with Claudette Cannatella the day before his termination, and the incident on July 21, 1993 where Mr. Weiss violently struck his hand on Mary Piccola's desk during a meeting. However, the evidence regarding the *effect* of these events on REN (and REN's belief about these events) was never disputed. Specifically, there is no material evidence that REN did not *honestly* believe that Mr. Weiss was a poor performer, had been insubordinate and was religiously harassing its employees. (Weiss Pet. at C25).

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[3]In fact, Mary Piccola herself is a Christian.

REASONS WHY THE WRIT SHOULD BE DENIED

I. CERTIORARI IS NOT WARRANTED BECAUSE THIS IS NOT AN APPROPRIATE CASE FOR THE COURT TO REVIEW THE STANDARD FOR TITLE VII RELIGIOUS HARASSMENT.

In his Petition for Writ of Certiorari, Mr. Weiss asks this Court to address whether voluntary prayer and proselytization among co-workers in a private corporation constitutes religious harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). (Weiss Pet. at i). In doing so, Mr. Weiss petitions this Court to clarify the standard for Title VII religious harassment. (Weiss Pet. at 18). However, it is wholly unclear why Mr. Weiss believes that the Title VII religious harassment standard is relevant in this case. Mr. Weiss' only claim at trial was that REN terminated his employment on July 23, 1993 "solely due to his religious beliefs," in violation of Title VII. (Weiss Pet. at C1). Accordingly, this case proceeded as a religious disparate treatment case through discovery and trial. However, it appears at this late juncture, that Mr. Weiss is attempting to interject the issue of Title VII religious harassment into this case, perhaps in an effort to divert the Court's attention from the relevant issues presented by REN in its own Petition for Writ of Certiorari, Case No. 01-292, docketed on August 17, 2001. For the following reasons, Mr. Weiss' arguments that the standard for Title VII religious harassment should be reviewed by this Court are not persuasive.

A. The Standard for Title VII Religious Harassment is Irrelevant.

In his Petition, Mr. Weiss seems to be arguing for the first time that REN was required to show that his actions constituted Title VII religious harassment in order to rise to a legitimate, nondiscriminatory reason for terminating him.

In support, Mr. Weiss states that the Fourth, Seventh and Eleventh Circuit Courts of Appeal are in conflict regarding the standard for Title VII religious harassment, and, thus, this Court should clarify it. Mr. Weiss also seems to be arguing that whatever the standard is, REN clearly did not show that Mr. Weiss' actions at work were Title VII religious harassment. Mr. Weiss' arguments are misplaced.

First, it was never REN's burden to show that Mr. Weiss' actions constituted Title VII religious harassment in order to claim his actions were a legitimate, nondiscriminatory reason for terminating him. See *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-507 (1993) (under the burden-shifting analysis, the plaintiff must first establish a prima facie case of discrimination, and if he is successful in doing so, then the burden shifts to the employer to produce evidence demonstrating that it had a legitimate nondiscriminatory reason for the adverse employment action). In fact, REN never argued that Mr. Weiss' conduct rose to the level of Title VII religious harassment, because it was not required to do so. Rather, REN argued that it could terminate Mr. Weiss for religiously harassing its employees in violation of its anti-harassment policy. (Weiss Pet. at C17-C19). Neither the district court nor the Eleventh Circuit questioned whether REN could present this defense, and it was never questioned by Mr. Weiss until now. See *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1019-1020 (4th Cir. 1996, cert. denied, 522 U.S. 815 (1997) (upholding termination of Evangelical Christian for sending personal, distressing letters to coworkers' homes, criticizing them for ungodly and shameful conduct).

This case is a disparate treatment case. However, Mr. Weiss' Petition claims for the first time that one of REN's reasons for terminating him (religious harassment of REN employees) is now somehow discrimination against him because the reason is based on his practice of his religion. Mr. Weiss argues that this decision will chill innocuous religious speech and conduct in the workplace, as

employers will perceive themselves to be at risk for allowing employees to discuss religion or offer others religious materials during work time. (Weiss Pet. at 21-22). However, the facts of this case fit into a subset of situations where harassment might not rise to the level of Title VII religious harassment, but may also be a non-discriminatory reason for termination. The courts have developed "basic parameters of conduct and have upheld employers that suppress proselytizing activities that become harassing." See Michael Wolf, Bruce Friedman, and Daniel Sutherland, RELIGION IN THE WORKPLACE, A COMPREHENSIVE GUIDE TO LEGAL RIGHTS AND RESPONSIBILITIES 62, American Bar Association, 1998. A careful employer can avoid a charge that it is discriminating against a proselytizing employee "if it has fully investigated the facts surrounding the proselytizing and has a sound factual basis for concluding that the employee has either disrupted work or has harassed coworkers." *Id.* Both the Eleventh Circuit and the district court pointed out that it was the continuous nature and frequency of Mr. Weiss' unwanted religious actions, in the face of warnings from his supervisors, along with the fact that Mr. Weiss was a supervisor, that made his conduct unacceptable, against REN policy and a legitimate reason for termination. (Weiss Pet. at A5-A8).

Second, even if the standard for Title VII religious harassment is relevant to this case, there is no conflict in the standard presented by the cases cited by Mr. Weiss in his Petition. See *Hernandez-Torres v. Intercontinental Trading, Inc.*, 158 F.3d 43, 48 (1st Cir. 1998) (jury instruction applied sexual harassment principles to religious harassment claim); *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012 (4th Cir. 1996) (plaintiff's claim based on religious accommodation, not religious harassment, so no definition of religious harassment given); *Venters v. City of Delphi*, 123 F.3d 956, 975 (7th Cir. 1997) (applies sexual harassment principles to Title VII religious harassment claim); *Beasley v. Health Care Service Corp.*, 940 F.2d 1085, 1089 (7th Cir. 1991) (court did not

need to address religious harassment claim because of finding that discharge was for good cause); David J. Stephenson, Jr., Annotation, *What Constitutes Religious Harassment in Employment in Violation of Title VII of Civil Rights Act of 1964*, 149 A.L.R. Fed. 405 (1998) (does not address a conflict in the circuit courts).[4] In fact, federal cases that discuss religious harassment consistently view religious harassment the same as race or gender harassment. See *Venters v. City of Delphi*, 123 F.3d 956, 975 (7th Cir. 1997) (the federal courts have been applying the same hostile environment principles to harassment based on race, religion, national origin and sex since 1971).

B. The Issue of Religious Accommodation is Not Presented By this Case.

In addition, to the extent Mr. Weiss is also arguing that REN is at fault for not accommodating Mr. Weiss' religious practices, this argument must fail, because the issue is not adequately presented by this case. (Weiss Pet. at 20-21). First, Mr. Weiss specifically did not properly preserve the religious accommodation issue for appeal. Mr. Weiss did not plead failure to accommodate in his initial Complaint, and the parties conducted no discovery on this issue. In addition, REN, believing that Mr. Weiss might attempt to insert this issue in this case at a later date, specifically addressed this issue in its Motion for Summary Judgment and Motion in Limine before trial. Because of this, the trial court specifically addressed this issue with Mr. Weiss' counsel during the trial. Mr. Weiss' trial counsel

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[4]In Footnote 3, Mr. Weiss states that most of the circuit court cases cited in his Petition present the religious harassment issue in the same regard as the instant case, i.e., "where an employer contends that it took action against the plaintiff religious employee for religious speech or conduct it considered harassing." (Weiss Pet. at 20, fn. 3). However, only one of the cited cases – *Chalmers v. Tulon Co. of Richmond* – deals with a situation where an employer uses the plaintiff's harassing conduct as a legitimate non-discriminatory reason for terminating the plaintiff.

never stated that this was a religious accommodation case, even when directly asked by the trial judge, and instead focused on the disparate treatment aspects of the case. (R 9/215/301). Moreover, at the jury charge conference, Mr. Weiss' counsel never requested a religious accommodation instruction. In addition, the issue of whether or not REN accommodated Mr. Weiss' religious practices was not posed to the Eleventh Circuit on appeal. Accordingly, because the religious accommodation issue was not addressed by Mr. Weiss at trial or on appeal, he did not properly preserve it for appeal to this Court, and this Court has no jurisdiction to review the issue. See *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000) (it is the general rule that issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts); *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987), *reh'g denied*, 481 U.S. 1033 (1987) (ordinarily the Supreme Court will not decide questions not raised or litigated in the lower courts).

Second, assuming arguendo, that this Court can consider this case in the religious accommodation framework, the evidence weighs in favor of REN. Mr. Weiss admitted at trial that he was aware of REN's anti-harassment policy and that as a supervisor he was responsible for assuring compliance with the policy. (Weiss Pet. at C6-C7). Mr. Weiss also admitted at trial that he never complained to REN that its policies and procedures conflicted with his religious beliefs. (Weiss Pet. at C6). Accordingly, Mr. Weiss gave no notice of his alleged need to be accommodated. See *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1019 (4th Cir. 1996) (in order to establish a prima facie religious accommodation claim, a plaintiff must establish that he or she informed his employer that his bona fide religious belief conflicts with an employment requirement). In addition, Mr. Weiss admitted that REN management told him that he could have consensual, non-threatening religious discussions with co-workers and subordinates. (R 9/215/265-266). Finally, the undisputed

evidence of Mr. Weiss' harassing behavior shows that allowing Mr. Weiss' behavior to continue would present an undue hardship to REN. (Weiss Pet. at A5-A8). Specifically, several employees testified at trial that they would have quit or taken action against REN if the company had not attempted to stop Mr. Weiss' religious harassment. (Weiss Pet. at C9-C10).

Accordingly, even if the religious accommodation issue was properly preserved for appeal, Mr. Weiss' claim should fail. Mr. Weiss failed to present a prima facie claim of religious accommodation because he did not notify REN of any alleged conflict between his beliefs and company policy. Alternatively, even if Mr. Weiss did present a prima facie case, REN adequately accommodated him by allowing him to have consensual religious discussions with co-workers. Finally, Mr. Weiss' unwelcome religious discussions presented an undue hardship on the conduct of REN's business by putting REN in an impossible situation vis `a vis its employees. See *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1019 (4th Cir. 1996) (if Tulon had authorized Ms. Chalmers to write the letters to her co-workers, the company would subject itself to possible suits from the co-workers claiming that Ms. Chalmers violated their religious freedoms, and the company was not required to accommodate that conduct); EEOC Dec. No. 72-1114, 4 F.E.P. 842 (1972) (EEOC ruled that an employer failed to maintain a work environment free of religious harassment triggering a Title VII violation when one of its supervisors preached about religion at work over the objection of employees).[5]

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[5]Throughout this section of his Petition, Mr. Weiss also refers to the First Amendment's protection of religious exercise as well as religious belief. However, the First Amendment is not at issue in this case, because there is no First Amendment right to religious speech in the *private* workplace. Thus, Mr. Weiss' references to the *Tucker* and *Brown* cases in Footnote 4 are irrelevant.

C. Mr. Weiss' Petition Ignores the Alternate Legitimate, Non-Discriminatory Reasons REN had for Terminating His Employment.

Finally, even if this Court believes that the Title VII religious harassment and/or accommodation standards are relevant to this case, certiorari is not warranted because review of those issues will not alter the effect of the Eleventh Circuit's decision. Mr. Weiss' Petition only focuses on one of REN's legitimate, non-discriminatory reasons for terminating him, i.e., his religious harassment of co-workers, subordinates and supervisors. However, at trial and on appeal to the Eleventh Circuit, REN argued two other legitimate, non-discriminatory reasons for terminating Mr. Weiss, i.e. poor performance and insubordination. Specifically, the district court found that the greater weight of the evidence supported REN's assertion that it terminated Mr. Weiss because of religious harassment and *insubordination*. (Weiss Pet. at C25). In addition, the Eleventh Circuit found that the weight of the evidence supported REN's argument that religious harassment, *poor performance* and *insubordination* led to Mr. Weiss' termination. (Weiss Pet. at A5-A8).[6]

Mr. Weiss was required to put forth sufficient evidence to challenge the truth of each of REN's reasons for its employment action. See *Combs v. Plantation Patterns*, 106 F.3d 1519, 1529 (11th Cir. 1997), *cert. denied*, --- U.S. ---, 118 S.Ct. 685, 139 L.Ed.2d 632 (1998) (defendant granted

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[6]Mr. Weiss notes in his Petition that the Eleventh Circuit erred in basing its decision, in part, on poor performance, because the district court did not find a legitimate nondiscriminatory reason based on poor performance. However, this is a distinction without a difference. Mr. Weiss' poor performance was addressed at every juncture of this case, and it was presented in REN's brief to the Eleventh Circuit as a legitimate non-discriminatory reason. In addition, the district court did not address Mr. Weiss' poor performance only because it stated it did not have to, as Mr. Weiss failed to undermine the veracity of REN's other stated reasons for his termination. (Weiss Pet. at C17-C18, fn. 2).

judgment as a matter of law because plaintiff failed to produce sufficient evidence to permit reasonable juror to reject each one of defendant's legitimate, nondiscriminatory reasons). Because Mr. Weiss does not challenge the Eleventh Circuit's decision that the evidence regarding Mr. Weiss' poor performance and insubordination weighs in favor of REN, his arguments regarding the standard for Title VII religious harassment, even if decided in his favor, would not affect the outcome of this case. REN would still be entitled to a new trial based on the Eleventh Circuit's unchallenged decision that the great weight of the evidence supports the fact that Mr. Weiss was terminated for poor performance and insubordination.

Accordingly, the issues of religious harassment and/or religious accommodation are not relevant to this case, and were not properly brought before this Court. In addition, the cases cited by Mr. Weiss in his Petition do not present a conflict regarding the standard for Title VII religious harassment. Finally, the fact that REN presented two other legitimate, nondiscriminatory reasons for terminating Mr. Weiss, assures that the outcome of this Petition would not affect REN's right to a new trial. Accordingly, certiorari is not warranted.

II. CERTIORARI IS NOT WARRANTED BECAUSE THE STANDARD FOR GRANTING A NEW TRIAL IS CLEAR AND WAS PROPERLY RELIED ON BY THE DISTRICT COURT AND THE ELEVENTH CIRCUIT.

Mr. Weiss' claim that this Court should grant certiorari to "bring clarity to the notoriously unsettled standard for granting a new trial" is unfounded. (Weiss Pet. at 23-24). The District Court applied the correct standard when it conditionally granted REN's Motion for New Trial. Moreover, the Eleventh Circuit Court of Appeals applied the proper standard in affirming the District Court's conditional order granting a new trial. The opinions of both

the District Court and the Eleventh Circuit more than adequately set forth the appropriate standard for granting a new trial. REN will not squander this Court's time with a full recitation of all of the relevant cases from the two opinions. However, there are several flaws in Mr. Weiss' argument that merit some discussion.

A. There is Not a Conflict Over the New Trial Standard in the Eleventh Circuit or Any Other Circuit in the United States.

This Court has ruled that the determination of a motion for new trial rests in the discretion of the trial judge. *See e.g., Globe Liquor Co. v. San Roman*, 332 U.S. 571, 574 (1948), *reh'g denied*, 333 U.S. 830 (1948)("Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart."); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940) (the district court has the discretion to weigh the evidence when considering a motion for new trial); *Allied Chemical Corp., v. Daiflon, Inc.*, 449 U.S. 33, 36-37 (1980) ("The authority to grant a new trial, moreover, is confided almost entirely to the exercise of discretion on the part of the trial court.").

Although Mr. Weiss tries to claim there is a conflict in the Eleventh Circuit Court of Appeals and other Circuits, the case law does not support the argument. The Eleventh Circuit has clearly made the distinction between the standard for granting judgment as a matter of law and a motion for new trial. *See National Car Rental System, Inc. v. Better Monkey Grip Co.*, 511 F.2d 724, 730-731 (5th Cir. 1975)[7],

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[7]All decisions from the Fifth Circuit handed down prior to September 30, 1981 were adopted as binding precedent by the Eleventh Circuit in *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

cert. denied, 423 U.S. 894 (1975) (when a district court is considering a motion for directed verdict, it decides a pure question of law without exercising discretion; however, when the trial court determines the propriety of a motion for new trial, the court "may and should exercise a sound discretion, and its ruling thereon will not be reviewed in an appellate court in the absence of a clear abuse of discretion."); *U.S. for the Use and Benefit of Weyerhaeuser Company v. Bucon Construction Company, Inc.*, 430 F.2d 420, 423-424 (5th Cir. 1970) (same); *Ard v. Southwest Forest Indus.*, 849 F.2d 517, 521 (11th Cir. 1988) (a district court may weigh the evidence to determine if the verdict is against the great weight of evidence; a new trial may be appropriate even if there is some evidence that supports the jury verdict).

Other circuits that have addressed the standard for granting a new trial have employed the same analysis as the Eleventh Circuit. *See e.g. Kearns v. Keystone Shipping Company*, 863 F.2d 177, 181 (1st Cir. 1988) (the district court has the discretion to order a new trial when it determines that the verdict is against the great weight of evidence; "[o]nly with appropriate caution and to prevent a miscarriage of justice should a trial court set aside a jury verdict, and only on a finding of an abuse of discretion should a reviewing court set aside the trial court's determination."); *Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 365-366 (3rd Cir. 1999) (same); *Turner v. United States*, 229 F.2d 944, 945 (6th Cir. 1956), *cert. denied*, 351 U.S. 970 (1956) (same); *Brown v. Syntex Laboratories, Inc.*, 755 F.2d 668, 673-674 (8th Cir. 1985) *citing Ryan v. McDonough Power Equipment, Inc.*, 734 F.2d 385, 387 (8th Cir.1984)(In determining if a verdict is against the weight of the evidence, the trial court may conduct its own evaluation of the evidence. It may "weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict."); and *Harris v. Quinones*, 507 F.2d 533, 535 (10th Cir. 1974) (same).

B. The Jury Verdict Was Against the Great Weight of Evidence, Making a New Trial Necessary.

In the case at bar, both the district court and the Eleventh Circuit reviewed the various facts and determined that the jury's verdict that religion made a difference in Mr. Weiss' termination was against the great weight of evidence. The district court noted that the dispositive issue (religious discrimination) "was neither simple nor the subject of highly disputed testimony. The dispositive issue was the complex one of Defendant's intent-whether Defendant terminated Plaintiff because it intended to discriminate against him on the basis of his religion or because it honestly believed he had been insubordinate and religiously harassing employees." (Weiss Pet. at C25). Moreover, both the district court and the Eleventh Circuit relied upon undisputed facts from the trial to support the decision that the jury verdict was against the great weight of evidence. The undisputed facts that support the district court and Eleventh Circuit's opinions will not be repeated here. It was clear to the trial judge that the jury verdict was against the great weight of evidence, making a new trial necessary to avoid a miscarriage of justice.

Mr. Weiss' primary area of attack on the district court and the Eleventh Circuit's opinions regarding a new trial is to claim that the undisputed facts are somehow now in dispute. This is the first time that Mr. Weiss has raised this issue and it is not persuasive. Throughout the trial, the post-trial motions and briefs and the briefs to the Eleventh Circuit, Mr. Weiss has not refuted the undisputed facts. Mr. Weiss admitted at trial that he was insubordinate to his

supervisor, he had performance problems[8], and he was warned several times to stop harassing employees with his religious beliefs. (Weiss Pet. at C6-C8, C19-C24 and A5-A8).

Mr. Weiss was a poor performing supervisor who used his position to harass subordinates, co-workers and supervisors with his religious beliefs. There was no proof that a reasonable jury could possibly rely upon to find that Mr. Weiss was the victim of unlawful religious discrimination. Therefore, a new trial is necessary in this case.

CONCLUSION

The standard for Title VII religious harassment is irrelevant to this case. Mr. Weiss' religious harassment of co-workers, supervisors and subordinates was in violation of REN policy, and, thus, was a legitimate, non-discriminatory reason for REN's decision to terminate Mr. Weiss. In addition, the Eleventh Circuit and the district court both determined that the great weight of the evidence in this case lays in favor of REN, and, based on that evidence, both courts granted a new trial. Specifically, the Eleventh Circuit concluded that the jury's verdict that religion made a difference in Mr. Weiss' termination is contrary to the great weight of the evidence, which "strongly suggests [Mr. Weiss] was terminated for poor job performance, insubordination, and religious harassment of

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[8]Mr. Weiss tried to claim that it was improper for the Eleventh Circuit to consider his performance problems as a basis for a new trial because the district court did not consider it below. This assertion is misleading. The district court did not have to reach this issue when ruling on the Motion for Judgment as a Matter of Law because Mr. Weiss could not discredit the legitimate, nondiscriminatory reasons of religious harassment and insubordination. However, in reviewing whether a new trial was warranted, the district court did list Mr. Weiss' performance problems as evidence of his workplace behavior. Therefore, it was proper for the Eleventh Circuit to consider Mr. Weiss' work performance problems in its analysis of a new trial. (Weiss Pet. at C17-C18, fn. 2; C23-C24; A5-A6).

co-workers, as alleged by [REN]." (REN Pet. at App. 7). For the reasons stated herein, this case presents no fundamental questions of law or any conflict among the United States federal courts of appeals. Accordingly, Mr. Weiss' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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